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Massachusetts Law Quarterly

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Issued by the Massachusetts Bar Association
53 State Street Boston 9, Mass.

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EXECUTIVE COMMITTEE 1951 - 1952

At a meeting of the Board of Delegates of the Massachusetts Bar Association held on June 9, 1951 the following persons were chosen, as provided in the by-laws, to serve on the Executive Committee for one year in addition to the President, Vice-Presidents, Treasurer, Secretary and Assistant Secretary ex officiis:

From the Board of Delegates

CHARLES S. BOLSTER, *Cambridge*
THOMAS M. A. HIGGINS, *Lowell*
INES DIPERSIO, *Belmont*
FREDERICK M. MYERS, *Pittsfield*
ROGER B. TYLER, *Brookline*

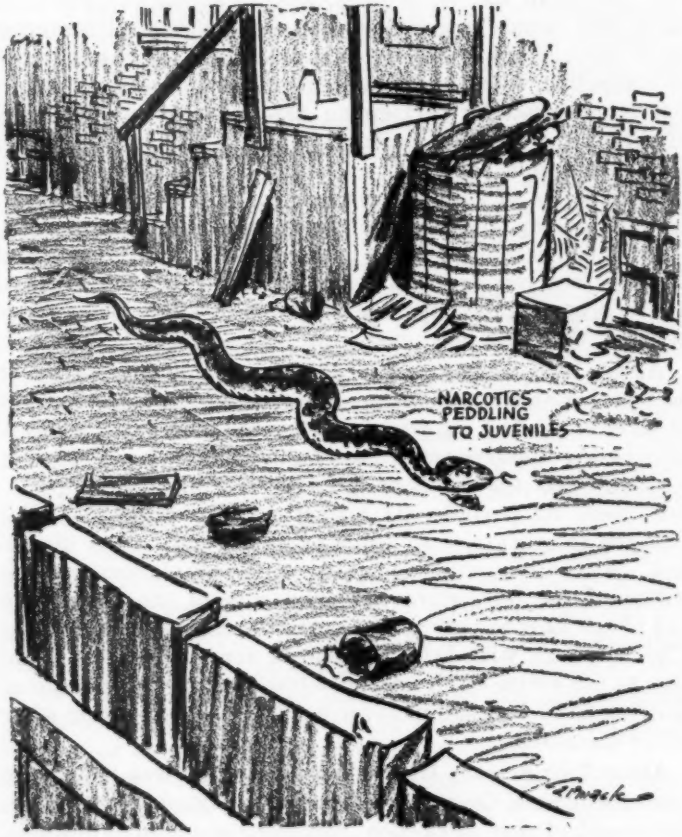
From Membership at Large

HARRY D. LINSCOTT, *Lynn* EDMUND M. MURRAY, *Wellesley*

NARCOTICS PEDDLING TO JUVENILES

(From the Christian Science Monitor, June 22, 1951)

The Sooner It Is Caged the Better



REPORT OF PRESIDENT SEARS

(At the Annual Meeting June 9, 1951)

The modern bar association movement, starting in New York about 1870, began in Massachusetts with the organization of the Boston Bar Association a few years later and various county associations before the turn of the century. The American Bar Association was organized in 1878 with about 300 members and now has about 43,000. Thereafter state associations came into existence not for the purpose of competing with either the local or national organizations, but to cooperate by performing functions beyond the reach of either the local or national bodies. The Massachusetts Bar Association came into existence and took its place in the procession of state associations in 1909. While its membership during the first 20 years was relatively small—about 1,000 members, more or less, the highest total being 1,250 before the depression beginning in 1929—it was an active organization from the start, more active than many lawyers, then and now, ever have realized.

About 1940 when the late Joseph Wiggin was president he traveled about to meetings of various county associations in an effort to find out the reason for the dwindling membership in the Massachusetts Bar Association. He found that it was largely the result of ignorance or mistaken information about its purpose, its history and its work. At that time the suggestion of an "integrated bar" was under discussion. At the request of the chairman of the Judiciary Committee of the legislature the presidents of the association and of the Law Society took a postal card vote on the matter (the questions with brief statements for and against being sent to the entire bar). About 3,000 answers were received showing 2,000 to 1,000 in favor but vigorous opposition after active discussion.

About 7 or 8 years later when the matter was before the Supreme Judicial Court, the opposition appeared still stronger. The result of that discussion, however, increased interest in the Association as a *voluntary one* and that interest has continued ever since. Gradually the membership, which had dropped in the depression to between 700 and 800, increased,

and today we are proud to have about 3,700 members and new members still coming in.

At the meeting in Swampscott in 1943 President Shattuck said

> "Lawyers in Massachusetts, like all other lawyers, may probably be grouped in their attitude toward bar association activities somewhat as follows:—
>
> "First, lawyers who don't see the need of associations, or in any event don't care about them. This attitude is perfectly understandable but . . . it is my experience that such persons often change their minds . . .
>
> "Second, there are lawyers who are genuinely interested and really enthusiastic and who believe, in their enthusiasm, that a strong association is the answer to all the evils of the profession, including its financial plight, and that the whole problem of encroachment upon the field of the lawyer can be solved only by a militant closing of the ranks, and fighting back at all competition. These men are more nearly normal, in my opinion, than the first group, but they have large capabilities of harm by overdoing a good thing.
>
> "Third, there are lawyers who believe that it is natural for lawyers to work together and meet together . . . that the lawyer's position is essentially that of a professed leader in public affairs, a leadership which is best demonstrated when it is collective and cooperative."

This last view seems to describe the real function of the bar and bar associations in "a government of laws" if lawyers realize their position and take it seriously, but not too seriously, for there is, of course, no place for a dogmatic sense of superiority. Lawyers are simply American citizens of the United States and of Massachusetts with special training and capacities for contributing their skills to the public welfare as other groups of citizens do.

Our annual institutes, of which this is the tenth, have contributed largely in bringing the lawyers of Massachusetts together with a greater healthy mutual understanding of the problems of the profession. Thanks to the characteristic labors of George Wainwright and his colleagues we are in the midst of another successful Institute and I will report to you briefly the activities during the past year on behalf

of the Executive Committee, for whose assistance throughout the year I wish to express appreciation.

1. First there was the merger with the Law Society resulting in one state-wide association and an increased membership.

2. The most notable action was a successful representative petition by all the eleven members of the Executive Committee for a writ of mandamus challenging the constitutional validity of a popular vote at the state election on November, 1950, on an initiative petition, resulting in a unanimous opinion of the Supreme Judicial Court holding the initiative invalid, clarifying the practice as to constitutional procedure for direct legislation and for the protection of the people and taxpayers and a saving of an estimated annual public expense of about $54,000,000 which threatened the Commonwealth with insolvency. The petition was printed in the "Quarterly" for December 1950. The opinion of the Court appears in 1951 A.S. 529-545.

3. A resolution widely publicized that in the opinion of the committee persons who are members of the Communist Party ought not to be eligible for admission to the Bar and shall not be eligible to membership in the Massachusetts Bar Association, and that the President notify the Bar Examiners and the Supreme Judicial Court of the foregoing resolution adopted by the Committee.

4. A resolution of the committee in opposition to the vote of the American Bar Association and House of Delegates in September 1950 in favor of an additional loyalty oath for lawyers and in opposition to a similar recommendation of the Special Commission in Massachusetts. This action was published in full in the "Quarterly" for May 1951 with the reasons for it and other information.

5. The plan, now in process, to establish a statewide list of competent and experienced trial lawyers as volunteers who will accept assignment by the courts without compensation to act as defense counsel in capital cases in which the defendant is financially unable to procure counsel himself.

6. Publication of discussions of the history of title of Massachusetts to her submerged sealands since 1629 and the impact of the divided opinions of the Supreme Court of the United States on the structure of the federal and state

governments to stimulate thinking about the need of congressional action to protect the interests of Massachusetts and of all the original thirteen states. A resolution as to the rights of Massachusetts to her sealands, following a previous resolution of the Executive Committee in 1949 published in the "Quarterly" for April 1949, has been sent to the President and all members of Congress. Copies of this resolution will be found at the registration desk.

7. Publication of draft of Revised Rules of the Supreme Judicial Court for discussion by the bench and bar before adoption.

8. Resolution, widely publicized, as to judges participating in political activities and campaigns, reading as follows:—

> "For the purpose of maintaining the dignity of, and public confidence in, the courts of the Commonwealth and freeing them from affording a basis of adverse criticism, the Massachusetts Bar Association urges that no justice of any court of the Commonwealth engage in partisan political campaigns, either by way of running for office, serving on political or campaign committees, acting as a delegate, or otherwise taking part in political conventions or engaging in like activities in such campaigns."

9. Continuation of publication of the Massachusetts Law Quarterly, now in its 36th volume, containing information (including reprints of annual reports of the Judicial Council) and discussions to stimulate professional thinking as to current local and practical problems.

10. A largely attended midwinter meeting in Springfield where a citation was awarded to Judge Medina.

11. Support of a pending legislative order for a recess study of the town planning and zoning acts.

12. You have before you for discussion the report of a committee on the activities of banks (printed in the May "Quarterly", pp. 10-13). The Executive Committee has, as yet, taken no action on this report. The subject has been discussed and action taken by the Executive Committee and by the Association from time to time during the past 25 years, all of which has been reported in print in the "Quarterly" for the information of the members. It is a difficult and somewhat explosive subject to deal with. In view of this fact and the fact that most of the 3,700 members of the Association are not

present at the meeting, I suggest for your consideration that the wisest course following discussion, will be to refer the whole matter to the incoming Board of Delegates for consideration in the light of the discussion and the previous history of the subject for such action as seems most in the public interest. The Board of Delegates is the most widely representative body of the Association under the bylaws and seems the natural body to consider a matter of this kind.

Finally, I wish to express on behalf of all of us, our appreciation, not only of the work of the committee on arrangements of this Institute, but of that of the Plymouth County and Town of Plymouth bar associations and of the hospitable welcome which they have given us, and, always, Mrs. MacLeod.

SAMUEL P. SEARS, *President.*

A CORRECTION OF THE MEMBERSHIP BOOK

Omitted from list of Probate Court Judges (p. 82) under Honorary Members in the new Membership Book recently published.

HON. WALTER L. CONSIDINE, Bristol County
HON. FREDERICK V. MCMENIMEN, Middlesex County
HON. WILLIAM J. HICKEY, JR., Norfolk County

NOTICE FROM MARTINDALE-HUBBELL

Will You Be Correctly Listed in the Next Directory?

Information regarding changes in listing in the MARTINDALE-HUBBELL LAW DIRECTORY (1952 edition) for subscribers as well as non-subscribers including the address of a former member or associate, if known, should reach the publisher at Summit, New Jersey, *not later than September 1st.* If so requested, this information will be held in confidence until the publication date which will be about January 1, 1952.

Lawyers not currently listed should be certain that the following information, i.e., name, address, year of birth, state and year of admission and educational data reaches the Company by the date indicated above either on the Company's Personal Report Form or by special letter. This is very important as the Special Lawyers Census Committee of the American Bar Association is working through the Martindale-Hubbell organization in the making of a census of all American lawyers, including those in government or military service, corporate employment, teaching positions, retirement, etc.

RECORD OF THE FORTIETH ANNUAL MEETING OF THE MASSACHUSETTS BAR ASSOCIATION — JUNE 9, 1951

Pursuant to notice printed in the "Quarterly" for May 1951, the Fortieth Annual Meeting of the Massachusetts Bar Association was held June 9, 1951 at the Mayflower Hotel, Plymouth, Massachusetts. President Sears presided.

Upon motion duly made and seconded, it was unanimously

Voted: That the reading of the minutes of the last Annual Meeting be waived and that the minutes, as printed in the "Quarterly" for September 1950, be accepted and approved.

Upon motion duly made and seconded, it was unanimously

Voted: That the reading of the Treasurer's report be waived and that the report, as printed in the Quarterly for May 1951, be accepted and approved.

Mr. George F. Garrity reported for the Nominating Committee the following nominations for the ensuing year, as printed in the Massachusetts Law Quarterly for May 1951 (p. 7).

President:	SAMUEL P. SEARS, *Newton*
Vice-Presidents:	GEORGE L. WAINWRIGHT, *Brockton* ROBERT W. BODFISH, *Springfield* REUBEN HALL, *Newton* FRANCIS X. REILLY, *Westboro* JOSEPH SCHNEIDER, *Brookline* FRANCIS J. QUIRICO, *Pittsfield* ARLENE F. MOLLOY, *Swampscott*
Treasurer:	PARIS FLETCHER, *Worcester*
Secretary:	FRANK W. GRINNELL, *Boston*
Asst. Secretary:	WILLIAM B. SLEIGH, JR., *Marblehead*

Members at Large—Board of Delegates

Thomas M. A. Higgins, *Lowell*
Harold Horvitz, *Newton*
Edmund J. Campbell, *Brockton*
Frederick M. Myers, *Pittsfield*
Donald T. Field, *Brookline*
Roger B. Tyler, *Brookline*
Charles S. Bolster, *Cambridge*

The Secretary reported that no other nominations had been received. A ballot being taken the nominees were declared duly elected. President Sears then read his annual report printed herein p. 5), which was accepted.

Mr. Wainwright asked that it be stated for the record that the Plymouth County Bar Association, the host to this year's Institute, is one of the oldest bar associations in the state, having been organized in 1875.

The Scholarship Committee, consisting of former presidents Shattuck, Proctor and Wait, reported that the Committee had recommended that the investment of the scholarship funds should be in securities in one or more investment trusts at the discretion of the Treasurer.

Mr. Harold Horvitz reported for the Grievance Committee summarizing the work of the Committee. He noted particularly that no disciplinary action had been necessary during the past year and that no single complaint had been received during the year involving charges of financial defalcation by an attorney, the relatively few complaints which had been received having been concerned with the amount of the fees charged, the manner of handling a case, or the nature of dealings with other attorneys.*

Mr. Rosenthal asked that the sentiments of this group be expressed with reference to the arrangements for next year's Institute. Mr. Rosenthal stated that he thought that a substantial number of members of the Association would prefer a return of the Institute to the New Ocean House in Swampscott. Mr. Paquet expressed the opinion that most of the group present would prefer to return to the Mayflower Hotel. Mr. Grinnell suggested the Hotel Wentworth in Portsmouth, New Hampshire, as well suited for the holding of the Institute. Mr. Paquet questioned the legality of a meeting of the Association held outside of the State. Mr. Grinnell, in reply, pointed out that the American Bar Association had met in London, England; the Canadian Bar Association had held its annual meeting in Washington; the Maryland Bar Association had met at Cape May, New Jersey, and that there should be no reason to fear the legality connected with an out of the

* A Berkshire County case was referred to a Special Committee whose report was submitted by the Executive Committee to the Supreme Judicial Court.

state meeting of this Association, as a subsequent formal meeting could be held within the State to avoid any question. Mr. Welch moved that it be the sense of this meeting that the next Institute be held at the Mayflower Hotel in Plymouth. Mr. Wait suggested that the meeting should not act to bind the Executive Committee since the meeting was not necessarily representative of the entire membership and that the Executive Committee should be left free to make its negotiations for the holding of the Institute at the place which seemed best adapted for the purposes. Mr. Welch thereupon withdrew his motion. The President asked for a show of hands and it appeared that a majority of those present favored a return to the Hotel Mayflower.

Mr. Raymond Barrett stated for the Lawyers' Reference Committee that he had not prepared a written report, but would file one with the Secretary shortly. He summarized the numerous objections to the operation of a lawyers' reference plan by a state association and said that his Committee had concluded that it was better for the Association to await an accumulation of experience by the Boston Bar Association. The Committee, therefore, recommended that no action be taken at the present time. Mr. Marr stated it as his opinion that this Association should act to encourage and co-ordinate the efforts of local Bar Associations to set up not only lawyers' reference plans but client referral procedures, so that attorneys in one part of the State could more readily select competent counsel in other parts of the state to whom to refer clients. Mr. Marr also asked, and was granted, permission to distribute among the members a statement on a case referral plan, a copy of which is annexed to these minutes.* Mr. Barrett agreed that there were advantages to the course of action suggested by Mr. Marr.

Upon motion duly made and seconded, the report was accepted.

The Committee on Unauthorized Practice of Banks, printed in the "Quarterly" for May 1951 (pp. 10-11) was presented by Mr. McLaughlin. He said that one meeting had been held with representatives of corporate fiduciaries and that a second meeting is now being arranged. The committee

* Mr. Marr's statement appears on p. 21.

recommends that if the proposed second meeting is unproductive, a petition should be filed in the Supreme Judicial Court asking the appointment of a commissioner to investigate and report on unauthorized practice by corporate fiduciaries. Mr. O'Brien, a member of the Committee, pointed out further that codes had been prepared in the past in rather generalized terms and had given rise to much discussion as to their interpretation. He pointed out that this showed the need for a more specific code which had led to the preparation by the Committee of the proposed "Declaration of Policy" as recently published in the May Quarterly. Mr. Vincent Mattola suggested that a statute should be enacted requiring that a trustee of a living trust file a petition for appointment in the Probate Court and that such trustee be appointed by the court and account to it. Mr. Tushins then moved that the report of the Committee be accepted and that the Committee be instructed to take appropriate action. Mr. Wait urged that the matter be referred to the Board of Delegates, as recommended in the President's report. He pointed out that while it was important that corporate fiduciaries be restricted from practicing law, steps should not be taken which would make it impossible for clients to use corporate fiduciaries in proper cases. While he believed that the Committee is very properly seeking to determine the line of demarcation, Mr. Wait suggested that it is a matter to be taken up with care and that the position taken by this Association should be one which recognizes fairly all interests involved. For this reason, it was his feeling that the matter should go to the Board of Delegates for determination as to the further action to be taken. The President suggested that Mr. Tushins withdraw his motion. Mr. Tushins stated that he did not wish to withdraw his motion but desired to have his motion acted upon. Mr. McLaughlin pointed out that the problem existed twenty-seven years ago and is still unsolved and urged that affirmative action be taken. Mr. Joseph Abrams asked the Chair if the Committee's action covers the activities of accountants and was informed that the Committee's activities, at present, concern only corporate fiduciaries. Mr. Horvitz moved an amendment to the motion that the matter of the Committee's report be submitted to the

Board of Delegates and that the Board determine the action to be taken. Mr. Tushins raised a point of order: that the amendment was a negation of the motion. The Chair ruled that the amendment was in order. The motion to amend was put to a vote and was passed. The main motion as amended was then presented and passed as follows:

Voted: That the report of the Committee on Unauthorized Practice be accepted and that it be submitted to the Board of Delegates for such action as they decide should be taken.

Mr. Reuben Hall reported that Senator McCarron had presented in Congress a bill which would amend the Defense Production Act of 1950 to extend the provisions of the Administrative Procedure Act to all agencies not now covered by the latter act including the agencies created under the Defence Production Act itself. It was then

Upon motion duly made and seconded, unanimously

Voted: That this Association go on record as supporting the bill introduced by Senator McCarron amending the Defense Production Act of 1950 to extend the provisions of the Administrative Procedure Act to all federal agencies not now covered by the Administrative Procedure Act, including all agencies created under the Defense Production Act of 1950.

Mr. Shattuck raised the question of the need for an increase in the Association dues and suggested that a committee be appointed to study the problem. He compared the dues of this Association with those of the American Bar Association at $12.00 and the Boston Bar Association at $15.00 a year. He also suggested that there was a need for greater activity on the part of the Legislative Committee of the Association and that it was a proper and important function of that Committee to notify the members of important pending legislation. Such increased activity, however, would require a paid secretary for the Legislative Committee which he thought desirable. He suggested that this matter also be studied. He, thereupon, moved that a committee be appointed by the President, the number of members to be at the discretion of the President, to consider the question of an increase in the dues of the Association. The suggestion was made that the increase of dues be voted on by this meeting. Mr. Rosenthal questioned the right of the meeting to change

the dues under the bylaws without advance notice. Mr. Garrity suggested that membership might be lost by an increase in the dues and favored reference of the matter to a committee for study and report, at the next annual meeting, as moved, rather than by action of this meeting. The motion was thereupon put to vote and was adopted as follows:

Voted: That a committee be appointed by the President, the number of members to be at the discretion of the President, to consider the question of an increase in the dues of the Association, and report at the next annual meeting.

Mr. Shattuck then moved that the same committee consider the wisdom of the employment of a paid secretary for the Committee on Legislation. Mr. Wait suggested that the motion was unnecessary since the Executive Committee has the power to employ such a secretary and should be allowed to exercise its power. Mr. Shattuck thereupon withdrew his motion.

Mr. Alan H. W. Higgins, state delegate of Massachusetts to the American Bar Association, made an appeal for new members for that Association. He pointed out that Massachusetts has a small representation in the American Bar Association in proportion to the number of practicing attorneys in this state. He called attention to the fact that the next annual meeting of the American Bar Association will be held in New York and asked that more Massachusetts men attempt to attend. He also announced that arrangements had been made whereby Martindale-Hubbell will indicate, in its listing of lawyers, membership in the American Bar Association. [See notice on p. 8.]

The proposed amendment of the bylaws as set forth in a notice of this meeting, namely, to make the vice-presidents of the Association members of the Executive Committee, was next taken up. The President spoke for the amendment and

Upon motion duly made and seconded, it was unanimously

Voted: That Article III A of the bylaws be and hereby is amended by inserting after the words "the President and Secretary ex officiis", as appearing in the second line of the fourth paragraph of said article, the words "and the vice-presidents ex officiis".

The suggestion was made that a committee should be appointed to study the problem of delay in the trial of cases.

The President stated that such a committee is already in existence. Mr. Phister suggested that there was need for an improvement in the Association's publicity and public relations. He noted that it had been considered many times in the past and that the question had been raised as to what the Association had done for the public as distinguished from its efforts for the benefit of the profession. He wished to point out that the Executive Committee had performed a great public service in filing and prosecuting its petition for writ of mandamus in the Supreme Judicial Court on the Old Age Assistance Initiative Petition. Upon his motion, the following resolution was unanimously adopted.

Resolved: That the action of the members of the Executive Committee of this Association in filing and prosecuting a writ of mandamus to establish the unconstitutionality of the Old Age Assistance Initiative is worthy of, and has the appreciation of, the members of this Association.

Mr. Hoy called attention to the action by the Boston Bar Association on the recommendation of a special committee on the subject of Communism, and in taking a poll of its members on a series of questions prepared by the committee. He suggested that a similar poll of its members be taken by this Association. He then read to the meeting the questions which he proposed be submitted to the members. A copy of the questions, as submitted by Mr. Hoy, is annexed to these minutes. Mr. Wait submitted that the President's report had noted the action of the Executive Committee of this Association on the subject and had been accepted by this meeting as read. Mr. O'Brien objected to the inclusion of recommendations 4 and 5. Mr. Barrett also spoke in opposition to the proposed questions. The President called attention to the action of the Executive Committee and noted that the Association had received communications from the Supreme Judicial Court and from the Bar Examiners in connection therewith. Mr. Hoy stated it as his opinion that the Association ought to have a poll of its members in order to determine fully the position of the membership on the various questions. On Mr. Myer's motion, which was duty seconded, it was almost unanimously

Voted: That the matter be laid on the table.

There being no further business the meeting was adjourned.

A true record.

Attest:

William B. Sleigh, Jr.,
Assistant Secretary.

NOTE

The six questions suggested at the meeting by Mr. Hoy appear in the "Bar Bulletin" as follows:

The Iowa Law Review, in its Spring Issue (1951, Vol. 36 No. 3 pp. 529-535) contains a note questioning the constitutionality of the proposed oaths under Exparte Garland 4 Wall. 333. Garland has been a member of the Confederate Congress.

ACTION OF THE COUNCIL OF BOSTON BAR ASSOCIATION AND OF THE SPECIAL COMMITTEE TO INQUIRE INTO COMMUNISM WITHIN THE BAR

(From the "Bar Bulletin" for June 1951)

At a special meeting of the Council of the Boston Bar Association held May 23, 1951, the following vote was unanimously passed:

"The Council of the Boston Bar Association is unalterably opposed to Communism in all its many forms and manifestations. It will implement this opposition in every effective way including, after careful investigation and a full and fair hearing, the expulsion from membership in the Association of any individual found to advocate, or to be a member of a party or organization advocating, the overflow of the Government of the United States, or of the Commonwealth, by force or violence, or by any other unconstitutional method; and it will further institute appropriate disciplinary proceedings looking toward the disbarment of any individual found subject to such expulsion."

It was also

VOTED: That the membership of the Association be polled as to approval or disapproval of the six proposals in the report of the Special Committee to Inquire into Communism within the Bar and that for the information of the membership a copy of the committee's report be sent to the members.

The report and proposals are as follows:

To the Council of the Boston Bar Association:

The undersigned have been designated as a committee to make recommendations to the Council with respect to the following matters:

1. The resolution recently adopted by the House of Delegates of the American Bar Association calling upon State and local Bar associations to institute proceedings for the disbarment of lawyers who are members of the Communist party of the United States or who advocate the principles of Marxism-Leninism.

2. The legislation recommended by the "Bowker" Commission to the Massachusetts Legislature with particular reference to the parts thereof relating to admission to the Bar and retention of the office of attorney at law. In substance the Commission recommends that no one should be admitted to the Bar who is not loyal to the United States and that all persons who are already members of the Bar shall within a prescribed period subscribe to and file an oath that they do not advocate the overthrow of the United States government by force or violence or any other unlawful means.

Your committee finds an overwhelming volume of evidence warranting the conclusion that:

1. There exists a conspiracy promoted by Soviet Russia to bring about the overthrow of the democratic government of the United States of America by force and violence.

2. The Communist Party of the United States is an instrument of that conspiracy.

3. The fundamental philosophy of this conspiracy is known as Marxism-Leninism.

4. Many persons of so-called "liberal" tendencies have become adherents of this philosophy or of the party,—some of these without a full realization of its purpose. We believe they should be enlightened.

One example of the body of evidence referred to above consists of the material which was before the jury in the trial of leaders of the Communist Party of the United States, in substance for that conspiracy in the much publicized trial in New York before Judge Medina. Of that evidence Judge Learned Hand said (*U.S.* v. *Dennis*, 183 F.2d 201 at 212):

> "The American Communist party is a highly articulated, well contrived, far spread, organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide, by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all existing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means".

In view of the foregoing, the committee recommends that the following be submitted for approval by a poll of the members of the Association.

1. That the Association, after a careful investigation and a full and fair hearing, shall expel from its membership any individual found to advocate, or to be a member of a party or organization advocating, the overthrow of the Government of the United States, or the Commonwealth, by force or violence, or by any unconstitutional method.

2. That application be made to the Supreme Judicial Court for the Commonwealth for an inquiry in the matter, and for the promulgation of a rule or order removing from the rolls of members of the Bar of this Commonwealth, and denying admission to membership therein, of any person who is a member of the Communist Party of the United States or is an adherent of the philosophy of Marxism-Leninism as above defined in paragraphs 1, 2 and 3.

3. That the Association publicly pledge its active support to any well conceived legislation which seeks to eradicate existing Communism as above defined and to stifle any future spread of such Communism in the United States and in this Commonwealth. Such legislation should provide reasonable safeguards for the protection of innocent people and be so expressed as to assure that any and all convictions, punishment, or disciplinary actions, be after a full and fair trial in accordance with American principles of justice.

4. That the Association publicly announce its approval, as a pre-requisite to the practice of law or to the continuance of the practice of law in the Commonwealth, of a proper attor-

ney's oath pledging loyalty to the Federal and Massachusetts constitutions and opposition to such Communism—this, notwithstanding that it may be but a virtual renewal of the oath taken by all lawyers on admission to the Bar.

5. That the Association expel any member who, after a reasonable time, neglects or refuses to take any proper loyalty oath which the Legislature may require.

6. That the Association take no action against any member who (though formerly advocating such overthrow, or formerly a member of an organization advocating such overthrow) now repudiates such advocacy and withdraws from all organizations advocating such overthrow. Any member thus repudiating such advocacy must establish his good faith to the complete satisfaction of the Association.

Conclusion

Your Committee submits the foregoing, in brief and necessarily imperfect form, because we believe that delay is dangerous. We know that many could have done better but we believe this is no time for extended debate over details or the niceties of legal procedure. The fire has reached the woods.

We report with both eyes on reality. We are aware that legislation alone can effect no complete reform. We know that an oath is as ineffective on evil men as it is unnecessary to men who are honest.

We offer no cure-all but a call to join the fight. We want the Boston Bar to take the lead. We want the lawyers to forget for the moment that they are lawyers and accept the greater responsibility of citizens and patriots. We want this Association to lend both hands to those who are making the fight at the front and we hope that no lawyer will ever be found in the rear except to put the brad into those who are still dragging their feet.

Special Committee to Inquire into Communism Within the Bar

Arthur Black, Chairman
James M. Hoy
Jacob J. Kaplan.

A PROTEST RECEIVED JULY 2, 1951

There is cause for concern in the recent proposals of the Special Committee of the Boston Bar Association to inquire into Communism within the Bar. Since the proposals go beyond the standards for membership in the Association and deal with membership in the bar, they are of concern to all members of the bar of the Commonwealth. In particular, the committee recommends disbarment of any person who is a member of the Communist Party or an "adherent of the philosophy of Marxism-Leninism", and a compulsory oath pledging opposition to Communism. As the committee's report points out, similar recommendations were made by the House of Delegates of the American Bar Association; but that action was taken against the advice of some of the most respected members of the American Bar, including John W. Davis, John Lord O'Brien, Owen J. Roberts, and Grenville Clark.

Why should these proposals, undoubtedly prompted by the highest motives, produce disquiet in members of the profession who are as far from being Communists as the sponsors themselves? The answer is, at least, suggested by a passage in the committee's brief report: "We know that an oath is as ineffective on evil men as it is unnecessary to men who are honest. We offer no cure-all but a call to join the fight. We want the Boston Bar to take the lead. We want the lawyers to forget for the moment that they are lawyers and accept the greater responsibility of citizens and patriots." As members of the Massachusetts Bar we oppose the proposals precisely because we believe that our civic duty requires us to remember, and, not even momentarily, to forget, that we are lawyers. As lawyers we have been schooled by training and experience in the careful definition of ends and the skillful devising of means to attain those ends.

We do, indeed face serious problems of internal security and—of special relevance to bar associations—professional integrity. Let the bar, by all means, be vigilant to discover, and relentless to punish, perjury and its subornation, obstruction of trial processes, faithlessness to clients, and other forms of professional misconduct. But, as means to attain these

ends, the committee's proposals are most ill-advised, because they are futile and dangerous, as experience and observation should make clear.

Let us content ourselves with the all-inclusive oath to support the Constitution, and not stimulate the invention of sub-loyalty oaths. For the rest, let us meet specific abuses within and without the profession by specific remedies, in the characteristic common-law way. In a time when pressing problems too often evoke emotional clamor, the community has a right to expect from the bar, not an echo, but the voice of seasoned and constructive counsel. We can best be patriots in remembering that we are lawyers.

John L. Hall	Robert G. Dodge
Charles B. Rugg.	Mark DeWolfe Howe
Paul A. Freund	Thomas H. Mahony
Francis G. Goodale	LaRue Brown
Franklin T. Hammond	William J. Speers, Jr.

JOSEPH W. BARTLETT

WHY LAWYERS REFERENCE SERVICE?

(Memorandum distributed at annual meeting by Vernon W. Marr)

At the 1950 Plymouth conference of the Massachusetts Bar Association the writer was privileged to hear in part the discussion of plans for referral of clients by bar associations. His impression was that those present were giving the subject too timid consideration as something epochal, new and breathtaking.

Legal-Aiding during the years 1921-1942 gave the writer a different view-point as had previous experience handling legal accounts of a large Boston concern with customers in nearly every Massachusetts community and in most large towns throughout the nation.* At the Boston Legal Aid Society we found indispensable an established plan for referring cases requiring service in all parts of this state and in all states and foreign countries. The few legal aid bureaus afforded the best arrangement but were not available except in

* United Drug Company.

large cities. The late Honorable Richard Talbot of the Springfield Legal Aid Society was a pioneer in this field and became the first president of the Massachusetts Legal Aid Association. Many other attorneys, acting individually also tendered valuable service; notable among them being Honorable Abraham Feinberg of Plymouth, Thomas Prince of Brockton, Henry Bowen of Fitchburg, Norman French of Worcester. Many younger men and women are fulfilling this function today throughout the commonwealth.

Appropriate coverage was also sought in other New England states, the Legal Aid Society of Rhode Island at Providence arranging for attorneys in other Rhode Island cities and towns outside the Providence area. The Connecticut statutes had provided for municipal legal aid but only a few municipalities made an appropriation for this purpose. In Maine, New Hampshire and Vermont we worked through the State Bar Association which cooperated very well in the functioning of our New England Legal Aid Council. Prominent in the work were such men as the late Honorable Harold Smith of Portsmouth, New Hampshire, and Frank Cowan of Portland, Maine, each a former attorney-general of his state, and Clark Smith, Esquire of Vermont who had served an apprenticeship in Boston.

Such endeavor as described above was founded upon a spirit of Christian service, a will to serve persons in need of help in their legal difficulties. Remuneration was secondary. The members of the bar today with increased expenses of operating an office, and taxes galore may indeed be more chary of such volunteering with precarious fees in sight. But the extension of such service to all persons in every city and town through local and county bar associations is a simple one with a minimum requirement of rules and regulations. An advisory fee regulating committee would be helpful in any such referred case system and the long established grievance machinery ever stands in the background.

Mention of a commercial credit experience several years ago was but a reminder that we conservative lawyers would but avail ourselves of the facilities long enjoyed in commerce and banking fields. True we have professional directories but they do not show who is available for run-of-the-mill cases.

This situation has more and more encouraged our Massachusetts attorney-generals to foster local corresponding attorneys especially in veteran cases and has developed other specialized lists.

These thoughts suggest that there have been previous attempts made to solve the problems presented but all are incomplete steps to meet the situation confronting the general practitioner.

The situation is therefore one for the Bar to face squarely now. After years as a practicing attorney the writer's observation of our bar secretaries, state, county and local, has been convincing that they have been men of the highest calibre. Upon them we can rely for honest execution of referral plans or their supervision with other association officials. Informally bar officials have felt compelled to render referral service to a varying degree to prevent injustice and maintain respect for their bar associations and profession.

As a result of the deliberations of the members of the Massachusetts Bar Association at Plymouth, the matter is now under consideration by this statewide organization. This status should not deter or delay county and local bar associations from acting forthrightly in their own sound discretion. The functions of the state organization for the present would seem to be a cooperative effort to coordinate and facilitate county and local plans to develop into smoothly operating agencies as an integral part of the general practice of law. Rapidly they should become accepted and highly regarded adjuncts of law practice.

Client referral plans are in the eyes of this writer destined to fulfill a dual purpose. First they will facilitate the layman's finding a lawyer. Secondly (not secondarily) they will become indispensable in enlisting the services of brother lawyers in the legal problems of clients in other localities.

September 1950

Revised June 1951

Vernon W. Marr
60 State Street, Boston

THE TENTH ANNUAL MASSACHUSETTS LAWYERS' INSTITUTE

At the Mayflower Hotel in Plymouth, on June 8th and 9th, 1951.

A year ago we were skeptical about holding an Institute outside of the Boston area, and for that reason, reserved only half the hotel. After our experience last year, we reserved for this year the full hotel, shore club and cottages. Our confidence was justified.

We are deeply indebted to our speakers, Guy Newhall, Walter H. Gilday, Reuben Hall, John W. Morgan, Samuel Joslow, Judge John E. Fenton, Commissioner Henry F. Long, and to our presiding officers, Walter Powers, Richard H. Field, William B. Sleigh, Jr., Joseph W. Buckley, and James E. Farley.

For those who attended the Institute who are interested in learning more about increasing their reading speed, information may be obtained by writing to Mr. Samuel Joslow, Director of the Reading Institute, 687 Boylston Street, Boston, Massachusetts.

The officials of the Town of Plymouth again fully cooperated in providing sight-seeing tours and the hotel added its bit by serving tea to the ladies Saturday afternoon, when they returned from their trip.

The Annual Meeting went off smoothly under the Chairmanship of our President, Samuel P. Sears, and ample opportunity was given for discussion of immediate problems.

The Institute reached a fitting climax with the dinner on Saturday night. The timely remarks of our Chief Justice, Honorable Stanley E. Qua, were well received. The Address of the Honorable Hugh D. McLellan was delightful and refreshing. We may not remember the names of those who "should have been famous," but we will never forget the classic way in which Judge McLellan presented their case.

I am deeply grateful to my Vice Chairmen, John B. Thorndike and S. Allen Chapman, and to all the others who in any way contributed to the success of this Tenth Annual Institute.

GEORGE L. WAINWRIGHT, *Chairman*
1951 Massachusetts Lawyers Institute

THE LEGAL PROFESSION AS A COURT OF APPEAL

A Request from the Chief Justice

At the banquet of the Institute Chief Justice Qua, in the course of his remarks, renewed the invitation which he extended to the bar at the 7th Institute in Swampscott in 1948. That was printed in the "Quarterly" for October 1948, but, as it may have been forgotten and as many new members have joined the Association since then, we reprint it.

We regard it not only as a unique, but as a great, judicial utterance.

ED.

(Extract from Remarks of Chief Justice Qua at the Massachusetts Lawyers' Institute, June 12, 1948)

The Supreme Judicial Court, like every court of last resort from which there is no appeal, is under a great public responsibility of which the court is very conscious. There is, however, the ultimate test of professional opinion which is faced by every American court.

Our court of appeals is the legal profession. Our corrective influence comes from you, comes from the practising lawyers of the commonwealth, comes from the professors of law, comes from the writings in the law reviews in general and from actions of other courts, in passing upon what we have done upon similar situations. Therefore, in order that we may have that corrective influence and have something to take the place of an appeal, it is necessary that we should first write opinions, so that the profession can read that which we have done—and, on behalf of the court, I ask you to read the decisions critically—but to read them before criticizing. I will be very much pleased indeed if, at any time, any member of the bar, or other person who knows something of the subject, is interested in a case—I don't mean interested personally—I mean interested in a subject, he will write any criticism that he has of a decision, or a line of decisions, provided, of course, it is thoughtful and intelligent criticism; and I know that the court will be helped by it.

So I say that the court is always dependent upon professional opinion for corrective criticism, and it is my earnest

hope that that influence will be brought to bear, and that each member of the bar will feel the responsibility that rests upon him as a member of the profession—and this goes for other judges as well—if he sees a mistake, to call our attention to it. Anything of that kind that you can do will help us out in the performance of our duties, relieve us to some extent from the weight of responsibility and will be thoroughly appreciated. I value the opportunity of being here to say that to you tonight.

NOTES ON DISCUSSION AT THE INSTITUTE

We had no sound recorder present. Next year we hope to have one as there are many requests from members for information as to the discussions. We summarize part of them as follows and expect to summarize the rest in the next issue.

Probate Law and Practice

Guy Newhall called attention to the following acts:

1. Chapter 312 of 1951 relative to Counsel fees. This act and its historical background are discussed at some length in a note in this issue.

2. Chapter 163 extending the time for administration from 20 to 50 years. This was discussed by Mr. Westgate in the "Quarterly" for May 1951, at p. 41. Everybody, including Judge Fenton, wanted to know what effect this act has on titles. No one knew. It is a sample of legislation which has not been thought through its effect on different branches of law.

The discussion at the meeting and in correspondence received by the editor shows that the conveyancing problems involved are not "fussy," but real throughout the Commonwealth. It is hoped that an amendment now under consideration by Mr. Newhall and others, may be prepared and adopted before the present legislature adjourns.

3. As to probate accounts, attention was called to the recent decision in *Reynolds* v. *Remick*, 1951 A.S. 703,

holding that a guardian ad litem cannot be appointed for a minor until he has been cited into court. Along with this we had a discussion of *Linde* v. *Vose*, 1951 A.S. 1, holding that in the particular case there was no occasion for the appointment of a guardian ad litem. We also took up the question whether or not accounts can be allowed on the assent of successor fiduciaries, referring particularly to the discussion in *Pierce* v. *Gould*, 143 Mass. 234.

A comparative study of jurisdiction in various proceedings in different courts may appear in a later issue.

4. In reference to joint accounts, the decision in *Drane* v. *Brookline Savings Bank*, 1951 A.S. 667, modifying or repudiating the old doctrine in the Chippendale case as to the effect of the parties signing the joint account contract at the bank was discussed.

Mr. Gilday discussed various problems of practice, especially in regard to adoption. These may be discussed in the next issue. Meanwhile one of them, where a divorce or separation decree has contained no order of support against a non-resident husband was discussed in the 26th report of the Judicial Council (35 M.L.Q. December, 1950 at p. 16.) The act recommended was not adopted but still seems advisable.

Judge Fenton called attention to problems under the Soldiers and Sailors Relief Act in connection with mortgage foreclosures, also the foreclosure of tax titles. As to tax titles he referred to the extended discussion in the 26th Report of the Judicial Council (35 M.L.Q. Dec. 1950 at pp. 31-38 where the cases in Massachusetts and in the United States Supreme Court upholding foreclosure decrees as absolute will be found.

Price and Wage Stabilization

We expect to print in our next issue a summary of this discussion by Mr. Reuben Hall and Mr. John W. Morgan.

THE TIDELANDS ISSUE MOVES NEARER MASSACHUSETTS

In the "Quarterly" for May 1951 (p. 13) we explained why the titles and sovereignty of Massachusetts needed protection by proposed action of Congress pending in a bill introduced by thirty-five senators, including Senator Saltonstall.

We stated that "it appears to be a common misunderstanding, *even among lawyers,* that the issue merely involves oil on the coast of California, Texas and Louisiana, but that oil is merely a local surface issue. The great issue involves the structure of the American government." We referred to the probability of Federal suits against Massachusetts and others of the original thirteen states, none of whom were parties to the three suits against California, Texas and Louisiana. Former Assistant Attorney General Bidwell, in his article on the subject in the "Bar Bulletin" of the Boston Bar Association for October 1950 said, "The issue was purportedly conceived in oil. To believe that it is so limited is to be strangely naive."

Judging from long experience in regard to other matters, as well as this one, it seems probable that Mr. Bidwell and some of the rest of us, may be regarded as unduly, or prematurely, concerned, but let us see who is right in the light of the most recent utterances of the Solicitor General of the United States, Mr. Perlman, which involves Masachusetts.

Extracts from the Hearing before the Senate Committee on the Interior and Insular Affairs in May 1951 (pp. 54-59):

Senator SMATHERS. The Court determined, however, that the Federal Government did have title to or proprietorship of the submarginal lands.

Mr. PERLMAN. I want to be careful about that. They expressly declined to use that word "proprietorship," but they did say that the Federal Government had paramount power and full dominion—and, in the last opinion—I think the Texas opinion—Justice Douglas wrote that title and power and sovereignty all coalesced into full and complete dominion over the submerged lands.

Senator SMATHERS. Are you able to make a distinction between power and dominion and proprietorship and title, as opposed to proprietorship and title?

Mr. PERLMAN. The text writers, going back to the beginning of history, have dealt with two things, going back to the Roman law.

They deal with "imperium and dominium." Those two words are used in discussing rights in areas such as this.

Imperium, from the Roman law, connotes the power, the sovereign power, over an area without necessarily asserting title, the right to rule. Imperium is the sovereign power over an area.

Dominium gets closer to what we know as title, actual dominium and actual title to and ownership of land. Now, in this proceeding it was argued, and argued forcibly, by some of the best authorities in the world that here the Federal Government had imperium but not dominium. Texas, I think, employed some of the greatest experts* in the whole world who signed the briefs that were filed in the Supreme Court; and the Supreme Court rejected those arguments and found that the Federal Government had both imperium and dominium with respect to the submerged lands of the sea.

Senator SMATHERS. Mr. Witness, that is fine for me. You need not go any further on that. I took that subject, too, when I was in college; but this is far beyond that.

Mr. PERLMAN. There is one sentence here, Senator, from the Texas case. I cite this from the majority opinion written by Mr. Justice Douglas, page 719 of 339, United States Reports; just this one sentence answers the question that you have put to me.

> And so, although dominium and imperium are normally separable and separate, this is an instance where property interests are so subordinated to the rights of sovereignty as to follow sovereignty.

Senator SMATHERS. I feel sorry for the poor students who go back to law school after this case, but may I just say this. I am seeking information. The Government has imperium and dominium over the submarginal lands, and at the same time they hold that they do not have that power for the oysters which cling to the bottom of the land. Is that right?

Mr. PERLMAN. Senator, I do not want to again express opinions on matters I have not studied in this connection and are not before the committee. I think, as I said this morning, there are many fields in which maybe the Federal Government could exercise authority; but it never has, and this Congress has never authorized it to do it; and there are many fields which the Congress never will authorize it to enter.

Senator SMATHERS. My whole point is this, Mr. Witness. We have off the Florida coast a great sponge industry. They have here off Maryland, your State, a lot of clams and oysters. If the Federal Government has had this right, we will say, from the beginning of its associationship in the family of nations, the right inherent in it for dominium and imperium, but has never exercised it, then it seems to me that, if this is the principle which you are arguing here, then

* Dean Pound, Charles Cheney Hyde and others whose views seem to deserve better treatment than they received. See Baylor Law Review Vol. 3 No. 2, winter issue 1951.

the State of Florida cannot, nor can the State of Maryland, make a lease with even men who are out to collect oysters off the bottom of the ocean in the submarginal lands because, while they are getting away with it now, they are only getting away with it now because the Federal Government has not thus far chosen to move in and exercise its right.

But, if this is the right principle, as you expounded, then the Federal Government can step in at any time and exercise that right, and these leases that you have for oysters and clams and sponges are going to be like the oil leases. They will not amount to anything.

That is why I address these questions to you to try to get some indication as to what we might expect even in those fields.

Mr. PERLMAN. Senator, of course I cannot answer for what future Congresses may decide to do. There are, as you know, a lot of fields, a lot of areas, in which the Federal Government has never been given authority by the Congress; and some Congress might do it for what they conceive to be the best interests of the people of this country, depending on circumstances at some given time. . . .

The CHAIRMAN [Senator O'Mahoney]. Was there not a distinction made in the Supreme Court between the subsoil and the contents of the water above the subsoil?

Mr. PERLMAN. I do not recall any such distinction. They did say something about the fish.

The CHAIRMAN. Yes; I recall that distinctly. In other words, the question here is: If the Supreme Court decision was the law, the constitutional law, that does not affect oysters, clams, sponges, or anything of that kind because all of those are above the surface of the subsoil. The Supreme Court case and the California and the Texas and the Louisiana cases were dealing solely with the contents of the subsoil, and that was the distinction that was made. . . .

Senator MALONE. One further question for my own information. I am not a lawyer; and, therefore, it is necessary for me to understand it. If I get the distinction now . . . there is a difference between anything you find on the surface under the water in these tidelands, and something that you find in the subsurface.

Then, if you found minerals on the surface under this subsoil, they belonged to the States under that ruling, I suppose; and, if you had to dig for the minerals, they would belong to the Government. Would that be the distinction?

Senator SMATHERS. That is right; that is the distinction.

Mr. PERLMAN. I do not make the admission. I do not want to admit anything. . . .

Senator MALONE. Let me just put this once more, then, for my own information. Your explanations are a little hazy to me, not being a lawyer. That is, if the oysters and the sponges are not affaffected, being on the surface of the ground under the water?

Mr. PERLMAN. I do not admit that oysters or other shellfish may not be affected. All I said was, and I stand on that, that Congress had never authorized any department of the Federal Government to

have anything to do with oysters or clams or sponges; and, until or unless they do, I think the States are free to pass what police legislation the States deem necessary to regulate that.

Senator MALONE. Mr. Chairman, one further question. What legislation was it that the Congress passed to give you the authority to claim what you have now claimed?

Mr. PERLMAN. That point was made that there had not been any act passed relating to this subject matter, and the Supreme Court said that the Attorney General had ample authority under the law to bring an action to determine where the rights lay. That is all.

But it is up to Congress to determine what should be done with the minerals over which the Federal Government has paramount power and authority, or the revenues from them. . . .

Senator MALONE. Why should it be up to Congress to determine about the minerals when it was not up to Congress to determine about the oil? What makes the difference? If you laid claim to the minerals out there on the surface, or if you laid claim suddenly to the oysters and the sponges, what is to prevent it being the same type of case? . . .

The CHAIRMAN. The witness made no distinction between oil and minerals.

Senator MALONE. He made a distinction that, in order for him to claim the sponges, it would take legislation; and he did not make that distinction in anything else. I wondered what made him so hesitant in claiming sponges and oysters and minerals when he claimed the oil without legislation?

Mr. PERLMAN. The question was raised, Senator, as to where the rights lay, and all that has happened is that the Supreme Court has determined that the right is vested in the United States.

Senator MALONE. Who raised the question?

Mr. PERLMAN. I do not know.

Senator MALONE. You raised the question; did you not? Why could you not raise the next question?

Mr. PERLMAN. I do not know what the next question is.

Senator MALONE. That you took it up from there. If the Department of the Interior raises the next one, which we certainly believe they will, those of us who have watched it, if they get away with this, you would naturally follow through; would you not?

Mr. PERLMAN. I do not know, sir. I did not fix the policy on this. It was done before I arrived. . . .

Mr. PERLMAN. My understanding is that this suit was filed by the Attorney General at the express direction of the President of the United States.

Senator MALONE. That is wonderful. Now then, if he directed them to do that again after the Secretary of the Interior, or whoever might have jurisdiction, claimed the other properties, would you allow it?

Now, let us get back to the question: You were directed by the President of the United States to enter the suit, and presumably the

idea was put in his head by the Department of the Interior. Is that right?

Mr. PERLMAN. That is my understanding.

Senator MALONE. If that again happened and he directed you to again enter the suit to claim the oysters and the sponges and the minerals that were on top of this land, and we do know that there are some in different places—for instance, the black sands in Oregon that contain chromite—then you would begin the suit in the natural course of events; would you not?

Mr. PERLMAN. You give an instance, Senator, of the black sands within Oregon. I do not think that any Attorney General would begin such a suit. He would know in advance that the Federal Government had no legitimate claim to them.

Senator SMATHERS. I wonder if you would yield right on that point?

Senator MALONE. I would be happy to yield.

Senator SMATHERS. You say the Federal Government has no legitimate claim to it. In the case of the *United States v. Texas*, in the opinion it says:

> Today the controversy is over oil. Tomorrow it may be over some other substance or mineral or perhaps the bed of the ocean itself.

So it seems to me that possibly in this decision they did not recognize this very fine distinction the Senator from Nevada points out. It applies one principle which is applied if you do not have to dig for it; but if you have to dig for it, then there is another principle that comes into it.

Justice Douglas apparently did not recognize that, because it may be that if we say we are going to have the submarginal lands oil under the dominium of the Federal Government, the first thing you know the clams off Maryland and the sponges off Florida also are under the dominium of the Government, and the contracts which have thus far been made are no good if the Government decides to step in.

Senator MALONE. And the black sands carrying the chromite of Oregon.

Senator SMATHERS. The black sands carrying the chromite of Oregon.

Senator MALONE. And the black sands can very easily be utilized for a substance that is now a strategic mineral and very hard to get, and will have to be shipped from foreign countries; and it is just as important as the oil and may be more important because there are a hundred billion barrels of oil shale out in Colorado and other places, and an unlimited supply of coal.

Mr. PERLMAN. Senator, I did not understand what you said about Oregon before. Are you talking about sands that are in the sea off of Oregon; is that the location?

Senator MALONE. Off the shore. It starts on the shore and carries right out into the ocean. And that is not the only thing; I just made that as an example because it would be easy for you.

Mr. PERLMAN. I would think that, as I indicated this morning in my testimony, there are large areas in which the Federal Government has never attempted to exercise its authority; and, if an effort were made with respect to the minerals or the materials that you have just mentioned in an area where the Federal Government could make the claim—if a situation arose in this country that made it advisable to make such a claim, I suppose the claim would be made.

I do not draw any particular distinction, Senator—and I want you to understand me on that—between things that you have to dig for in the subsoil of the ocean and other material. All I say is the Federal Government has never entered those fields; so far as I know, they never will.

But if it came to a situation where the Federal Government, perhaps by express direction of the Congress of the United States, had to take action in such fields, I would assume that such action would be taken.

Senator MALONE. Now, Mr. Chairman, the witness covers three or four fields and gets on both sides of the question. No legislation has been passed by the Congress to direct the Government to claim the oil. . . .

Therefore I ask the witness why they could not, or if they could, assert the same claim on surface minerals under the ocean, or sponges or anything else. I asked him if it could be done.

Mr. PERLMAN. In my opinion it could be done. . . .

Senator MURRAY. It is your question of preserving the sovereignty of the United States, and if anything is necessary for the protection of that sovereignty in the United States, it could claim it.

Mr. PERLMAN. It seems rather remote to deal in such situations; but if, for instance, we had a great food shortage in this country, if it became necessary for the Federal Government to preserve the food supplies, if it became necessary for the Federal Government to regulate the taking of fish off its shores to protect the lives and the welfare of the people of this country, Congress would do it. . . .

Senator MALONE. Could the Federal Government do this thing that you have just outlined without any Congressional action?

Mr. PERLMAN. I have not considered that question, Senator.

Comments

In the story of the "Muniments of Title" of Massachusetts since 1629, in the "Quarterly" for March 1950 we discussed the remarks of the majority opinion in the California case about Federal "need" as a reason for Federal claims to state property in spite of the 10th amendment.* We attacked the doctrine of "need" on grounds adequately stated by Mr. Justice Reed in

* As Dean Pound said, somewhere, we must take over law from the Court but, thank God, not our history. The ratifying conventions of 1788 distrusted a central government. Regardless of the Latin words "imperium" and "dominium", they did not intend that that government should grab their land and they said so.

his dissenting opinion in the Texas case, quoted by Mr. Bidwell in the article referred to.

Mr. Justice Reed (Mr. Justice Minton concurring) in U. S. v. Texas, June 5, 1950, said: "The necessity for the United States to defend the land and to handle international affairs is not enough to transfer property rights in the marginal sea from Texas to the United States. . . . The needs of defense and foreign affairs alone can not transfer ownership to an ocean bed from a State to the Federal Government any more than they could transfer iron ore in uplands from State to Federal ownership. National responsibility is not greater in respect to the marginal sea than it is toward every other particle of American territory." See 339 U. S. 707, at p. 723.

Mr. Justice Frankfurter's opinion applicable to both the Texas and Louisiana Cases (see 339 U. S. at 723-4).

"Time has not made the reasoning of *United States* v. *California*, 332 U. S. 19, more persuasive but the issue there decided is no longer open for me. It is relevant, however, to note that in rejecting California's claim of ownership in the offshore oil the Court carefully abstained from recognizing such claim of ownership by the United States. This was emphasized when the Court struck out the proprietary claim of the United States from the terms of the decree proposed by the United States in the *California* case.*

"I must leave it to those who deem the reasoning of that decision right to define its scope and apply it, particularly to the historically very different situation of Texas. As it made clear in the opinion of Mr. Justice Reed, the submerged lands now in controversy were part of the domain of Texas when she was on her own. The Court now decides that when Texas entered the Union she lost what she had and the United States acquired it. How that shift came to pass remains for me a puzzle.

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* "The decree proposed by the United States read in part:

1. The United States of America is now, and has been at all times pertinent hereto, possessed of paramount rights *of Proprietorship* in, and full dominion and power over, the land, minerals and other things underlying the Pacific Ocean. . . ."

"The italicized words were omitted in the Court's decree. 322 U. S. 804, 805."

With these statements of the three minority judges in mind and the story of the ancient title of Massachusetts in the "Quarterly" for March 1950 and May 1951 is it not puzzling to find that a minority—majority of four justices, *apparently*, considering themselves commissioned as justices to ignore, or rewrite the facts of our constitutional history as a basis for overruling the 10th amendment and its history beginning in Massachusetts, as well as all, the earlier opinions affirming the rights of the original thirteen states—the parents of the Federal Government when none of them were parties to the litigation?

Mr. Justice Jackson did not sit in any of the tidelands cases. In 1941, while Solicitor General he wrote an interesting book entitled "The Struggle for Judicial Supremacy". The book was written frankly from "an administration point of view" (see Preface p. XVII). His seventh chapter is entitled "The Court Retreats to the Constitution." Much has happened since 1941. Has not the "retreat" turned into an aggressive attack, without judicial restrain, by the minority-majority of the justices, on the facts of constitutional history while professing to interpret the document?

The *expressed* doctrine of "need" has progressed from "oil" to "clams" "oysters" etc. which means Massachusetts.

When the Solicitor General of the United States describes the Federal conception of power and the wholesale possibilities of future action on the doctrine of "need" in the passages quoted from the committee hearing, are we wrong in suggesting that the people of Massachusetts and, especially the lawyers, wake up to what is going on? Are we wrong in suggesting that counsel for every owner of shore property, of every fisherman or other person interested in shell fish, of every city and town on the Atlantic coast, of every inland owner who may find uranium or something else of value like the "black sands" in Oregon, which the Federal government may "want" in future, should write to his senator and representative urging the passage of legislation to confirm the rights of Massachusetts? Think it over and, if you don't like it, act now!

F. W. G.

Resolution of the Executive Committee of May 16, 1951, sent to the President and All Members of Both Branches of Congress and Printed in Full on the First Page of the Congressional Record of June 11, 1951, on Motion of Senator Saltonstall.

THE PRESIDENT OF THE UNITED STATES

AND

THE HONORABLE MEMBERS OF THE SENATE

AND OF THE

HOUSE OF REPRESENTATIVES OF THE
UNITED STATES

As members of the Executive Committee of the Massachusetts Bar Association we respectfully submit for your consideration the following resolution (adopted May 16, 1951).

SAMUEL P. SEARS, *President*

REUBEN HALL, Vice President	Newton
THOMAS M. A. HIGGINS	Lowell
PARIS FLETCHER	Worcester
FREDERIC S. O'BRIEN	Lawrence
BENNETT SANDERSON	Littleton
FREDERICK M. MYERS	Pittsfield
INEZ DI PERSIO	Belmont
FLETCHER CLARK, JR.	Middleboro
WILLIAM B. SLEIGH, JR.	Marblehead
FRANK W. GRINNELL, Secretary	Boston

RESOLUTION ON TIDELANDS

WHEREAS Massachusetts received title to its submerged sea lands from the English Crown by the Colony Charter of 1629 subject to certain reserved rights of the crown, and said title and that of persons holding thereunder were confirmed by the crown by the Province Charter of 1692 and all reserved rights of the crown were released and ceded to the Commonwealth by the Definitive Treaty of 1783 and protected by the constitution of the United States, especially by the Tenth Amendment, and were recognized by the Supreme Court of the United States in *Harcourt* v. *Gaillard*, 12 Wheaton, 524, and many other cases as specifically set forth and explained in the Massachusetts Law Quarterly for March 1950, and

WHEREAS by chapter 289 of the acts of 1859 (now section 3 of Chap. I of the General Laws of Massachusetts) the territory was specifically defined as follows—

> "Section 3. The territorial limits of the commonwealth shall extend one marine league from its seashore at extreme

low water mark. If an inlet or arm of the sea does not exceed two marine leagues in width between its headlands, a straight line from one headland to the other shall be equivalent to the shore line."

AND WHEREAS the United States never acquired any title to the submerged sea lands of Massachusetts, one of the original thirteen states, except by express cession, but the Supreme Court of the United States, in recent cases to which Massachusetts was not a party, has confirmed a claim of the United States to such submerged sea lands of all of the original thirteen states and thus clouded the title of Massachusetts land, which claim is called "paramount rights in and power and dominion over" the sea lands "an incident to which is full dominion over the resources of the soil under that water area." (See *U.S.* v. *California*, 332 U.S. at p. 38), and these "rights" are asserted to transcend those of "a mere property owner". (See p. 29)

NOW, THEREFORE, the members of the Executive Committee of the Massachusetts Bar Association, urge upon the Congress the passage of pending legislation to confirm the rights and title of Massachusetts within its historic boundaries.

This resolution supplements the memorial of the Massachusetts Legislature of March 18, 1948 (partly reprinted in the Massachusetts Law Quarterly for March 1950) and the resolution of this committee in support of similar legislation then pending in Congress, which was sent to the President and all members of Congress in April, 1949.

NOTE

The problem has already arrived in a State Court on a question which should interest Commmissioner Long as it relates to state taxation. See p. 74 herein.

BOOKS RECEIVED

Justice and Administrative Law—A study of the British Constitution. Third Edition, by William A. Robson of Lincoln's Inn. 1951, Stevens & Sons Ltd., 30S, net, 119 & 120 Chaucery Lane, London, W. C. 2

Copyright and Industrial Designs by A. P. Russell-Clarke of the Inner Temple 1951, Sweet & Maxwell Ltd., 1951. 37S/6d net. 2 & 3 Chaucery Lane, London W. C. 2

These books will be reviewed in a later issue.

A DEFENSE OF THE SUBDIVISION CONTROL LAW AND PROPOSALS FOR PERFECTING IT

By PHILIP NICHOLS

It was a great surprise to most persons interested in city and town planning when they learned that John A. McCarty, Esquire, a well known and highly respected Boston real estate conveyancer, had written an article published in the December 1949 issue of the Massachusetts Law Quarterly (followed by a similar article in the May, 1950 issue) in which he made a bitter attack upon the subdivision control law (G. L. c. 41 sections 81K to 81Y inc.), charging that under that statute the use of real estate by its owner is so drastically restricted that the restriction amounts to a pre-emption of his property.

Since the only restriction imposed upon real estate by the subdivision control law is with respect to the location and construction of the ways provided for access to the interior lots in a new subdivision, and the law has no application to a new subdivision at all unless new ways are required for such purpose, Mr. McCarty's characterization of the effect of the law on private ownership as pre-emption seems a bit extreme. Moreover, nowhere is there any recognition in either of Mr. McCarty's articles of the purpose of the subdivision control law or of the evils that it was intended to overcome, so that the reader can intelligently consider for himself whether these evils justified the invoking of the police power, and whether the restrictions imposed by the law were reasonably necessary for the protection of the public.

Mr. McCarty says, rather condescendingly, that he does not disapprove of city planning in principle, but he fails to recognize that subdivision control is not, like most other forms of city planning, based upon anticipatory estimates of the course of future development of our growing cities and towns, but is designed to prevent the present destruction of existing values and the present blasting of hopes for the future in the most promising sections of even our best governed municipalities, in disregard of the hopes of their inhabitants and the efforts of their elected officers.

The evils which the subdivision control law was intended by an exasperated public to meet were primarily the outcome

of the unregulated laying out of ways by private real estate developers in order to provide access to the interior lots within their developments. Such ways, unless laid out and accepted as public ways in the statutory manner, are not public ways. They are not necessarily open to public use. Nevertheless as cities and towns grew in population, the growth was largely taken care of by the acquisition by private real estate developers of tracts of vacant or sparsely occupied land and the subdivision of such tracts into lots for purposes of sale, with or without newly erected dwelling houses upon them; and unless the tract so subdivided was so small that all of the lots fronted upon existing streets, it became necessary for the developer to provide streets or ways within his subdivision, so that the interior lots could be reached from the nearest public ways.

Unhappy experience had shown that in many cases a developer had designed a street plan with the sole object of securing the greatest profit for himself and with little regard for the welfare of the community. The streets were often too narrow or too steeply graded, and inadequately surfaced and completely out of line with the general street plan of the neighborhood. It might be impossible to provide a water supply and an adequate sewer system in the development, at least without disproportionate cost.

If, after the developer had sold his lots and moved on to fresh fields of exploitation, the city or town failed to provide the essential improvements, serious problems of health and safety might arise. If on the other hand the city or town undertook to improve conditions, it would be put to great expense, and it would in any event be almost impossible to redesign the street system after roads had been built and the lots had been sold in accordance with the developer's plat. The streets in the subdivision soon became, in fact if not in law, the public ways of the neighborhood. Thus it would often turn out that, however devoted to sound principles of street design and construction the inhabitants and the elected officials of the city or town might be, the street systems of the newly developed sections of growing cities and towns were in fact unsoundly designed and improperly constructed by selfish and sometimes unscrupulous real estate developers.

The indirect harm of the unregulated subdivision of land often went far beyond the infliction upon the public of an improperly designed and constructed street system. If an unregulated subdivision were built upon, it was apt soon to turn into a decadent area or slum; if not built upon, it soon became a nest of tax title property.

The evil became so great that in 1936, by chapter 211 of the Acts of that year, a subdivision control law following in general the type of statutes on this subject adopted in other states, was put into effect. The demand for this legislation proved to be so great that over one hundred and forty cities and towns have taken advantage of its provisions. No litigation has reached the Supreme Judicial Court attacking the constitutionality or asking for interpretation of the statute; and, when the 1936 statute was revised and clarified in 1947, no criticism of the principle of the act by real estate developers, conveyancers or any other group was heard at the public hearing before the legislative committee which considered the bill, although at least one of these groups was specifically asked for criticisms and suggestions. Such discussion of the law as was commonly heard turned largely on providing even more drastic means of preventing evasion by the less scrupulous real estate developers of the intent of the law.

It was accordingly a great surprise to most persons interested in city and town planning when Mr. McCarty's articles were called to their attention, and the present writer has been many times urged to make a reply.

The specific complaints which Mr. McCarty has made against the subdivision control law are not, in the opinion of the writer, warranted, if the law is given a reasonable construction. In some instances extreme and unjustified interpretations of the law by over-enthusiastic planning boards are cited by Mr. McCarty as showing the arbitrary character of the statute itself. In other cases provisions which Mr. McCarty deems harsh and arbitrary are in fact a necessary and justifiable exercise of the police power.

Mr. McCarty's first illustration of the inequity of the law is the lack of protection given to a plat of land recorded before subdivision control went into effect in the town in which the land is located. Obviously the mere recording of a plat does

not by itself establish any legal rights in the land shown on the plat against or in favor of the owner or anyone else. It was not thought reasonable that the principle of subdivision control should be nullified by giving immunity to every plat recorded in the last three hundred years when none of the ways shown on the plat had been built and none of the lots sold. If the ways had been constructed, the statute is not applicable; if any of the lots had been sold with appurtenant rights of way over the ways shown on the plat, the statute expressly provides that the requirements are not applicable to such ways. It is only "paper" or unconstructed ways on an old plat, in which no rights of way have been established, that require approval of the planning boards. This, it would seem, is not unsound or oppressive legislation.

Another complaint is that the statute would be applicable to the conveyance, by an owner of a large estate fronting on a public way, of a single parcel in the rear, even to a member of his own family, since in such case a way of some sort would be required to provide access to the rear lot. Undoubtedly, in many of such cases the planning board would impose very limited requirements with respect to the width and construction of the driveway to the rear lot; but such a case cannot be left wholly unregulated, because otherwise, when the original estate is sold, the driveway, however inadequate, might lawfully be used as the sole access to two rows of new houses, and eventually become, in effect, a public way.

Mr. McCarty also cites a case in which a subdivider had developed a subdivision and built a street, put in water pipes and sold the lots fronting upon the street. Later a permit to erect a house on one of the lots was refused because the grade of the street was too steep. Mr. McCarty stated that the plat of the subdivision in this case had never been approved by the planning board, but he does not state whether subdivision control was in force in the town in question when the subdivision was undertaken. If it was not, the planning board had no power to require the change of the grade. If it was, it can only be commented that one runs a considerable risk in undertaking an extensive building development in disregard of the law.

In the second article Mr. McCarty complains because some planning boards attempt to regulate the size and width of

lots in subdivisions, even although there may be different and less stringent requirements under the zoning ordinance or by-law in force in the same city or town. In my opinion the subdivision control law gives planning boards no such power. In fact the statute gives planning boards little, if any, control over the lots in a subdivision into which the tract is to be divided. The lots must, it is true, be shown on the original plat, so that the planning board may make certain that there is a way providing access to every lot; but, after the plat has been approved, the developer may shuffle his lots around as he sees fit, provided only he leaves every lot accessible by an approved way. The law is not to be blamed because some over-zealous planning boards exceed their authority. An aggrieved owner in such a case has his remedy, plainly set forth in the statute.

The section of the statute giving an aggrieved party the right of appeal under which the Superior Court may annul the decision of the planning board "if found to exceed the authority of such board or make such other decree as justice and equity may require", which Mr. McCarty appears to consider inadequate, is a verbatim copy of the corresponding provision of the zoning law, and of many other laws providing judicial appeal from actions of administrative boards. These statutory provisions have frequently been found adequate to justify consideration on the merits of the order appealed from and to authorize appropriate action by the court to modify, as well as to annul, the order.

Mr. McCarty asserts that it is not clear what is meant by "recording" a decision of a planning board. The statute requires a decision of the planning boards to be transmitted to the city or town clerk. Presumably it would be entered by him on his records. It is this "recording", it would seem clear, which starts the period of fifteen days during which the right of an appeal may be exercised; and it may be added, to meet another objection of Mr. McCarty, operates to give public notice of an amendment or rescission of approval of a plat, which is subject to all of the procedural requirements of an original approval. There are other criticisms by Mr. McCarty of the subdivision control law, but these are the most important.

While the specific objections raised to the subdivision control law in the two articles in question are largely unfounded, the articles have served a useful purpose in bringing to a head a growing fear upon the part of many conveyancers, as they faced the recent flood of subdivisions undertaken to provide whole villages of small one-family houses in a substantial number of our cities and towns, that clouds might be placed on titles through action under the subdivision control law which a most careful examination of the records in the appropriate Registry of Deeds would not disclose. So also some constitutional lawyers felt that the law went too far in giving an unlimited discretionary power to planning boards in approving or disapproving plats, and thus, in opposition to the principle laid down by John Adams in the Massachusetts Constitution, set up a government of men and not of laws.

As a result, the author of this article, on behalf of the Massachusetts Federation of Planning Boards, caused a bill to be introduced into the Legislature this year (H. 853) through which, it was hoped, these objections would be overcome. This bill, in its original form, while it met many of the foregoing objections, was not entirely satisfactory to the conveyancers and the constitutionalists, and, after a friendly discussion, by committees of conveyancers and planning boards respectively, it was agreed that the following priniciples ought to be established in the law:

(1) The planning board of each city or town would be directed to adopt rules and regulations setting forth the specifications for the design and construction of ways in subdivisions in such city or town, so that a developer would know in advance what was required of him.

(2) A planning board should be required to state in writing its reasons for disapproving, or requiring modification of, a plat.

(3) A register of deeds should not be permitted to record a plat of land in a city or town in which subdivision control is in effect showing ways of any kind, unless the plat bears on its face the approval of the planning board, or a statement by the board that approval is not required.

(4) It should be made certain that the names of the cities and towns in which subdivision control is in force, and the

action of the appropriate planning boards in approving, or amending or rescinding this approval of, plats appear conspicuously in the registry of deeds.

(5) Many of the points in the interpretation of the law, which have hitherto caused doubt and uncertainty, whether warranted or not, should be cleared up.

It is expected that by next year, after every qualified person has been given a chance to offer suggestions, the law can be redrafted in such a way as to afford the necessary protection to the public and at the same time to satisfy the qualms of the constitutionalists and the desires of the conveyancers.*

Note

* Under a resolve reported by the Committee on Rules (H. 2551) the bill to amend the sub-division control law (H. 853) and several other bills relating to planning and zoning, would be referred to a special recess commission for investigation, study and recommendations. At the time when this article went to press, this resolve was still pending before the Legislature.

A PUBLIC OFFICIAL'S RIGHT OF ACCESS TO RECORDS RELATING TO HIS OFFICIAL DUTIES

The following opinion was rendered in October 1950 by Mr. Justice Wilkins, sitting as a single justice. The case was not carried to the full bench and, as the opinion will not appear in the Massachusetts Reports, we requested a copy for publication and, with his consent, we print it as the latest statement of the law of the subject for convenient reference of the bench and bar. ED.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPREME JUDICIAL COURT

No. 49323 LAW

HAROLD E. STEVENS

v.

WILLIAM T. MORRISSEY & OTHERS

FINDINGS, RULINGS, AND ORDER

This case was heard on the respondents' demurrers and on a statement of agreed facts. As all questions argued are involved in a consideration of the merits, orders are to be entered overruling the demurrers.

The statement of agreed facts in part reads: "The parties agree that the case may be submitted to the Supreme Judicial Court on the pleadings and the following agreed statement of facts and without the offering of testimony by any party, unless at the request of the court." There was no testimony offered either by request of the court or otherwise. The statement of agreed facts amounts to a case stated. *Caissie* v. *Cambridge*, 317 Mass. 346, 347.

I accordingly, take no action upon the respondents' requests for rulings. *Quincy* v. *Brooks-Skinner, Inc.*, 325 Mass. 406, 410, 411; Mass. Adv. Sh. (1950) 275, 278.

The underlying question is whether the petitioner by virtue of his office as associate commissioner of the metropolitan district commission has an absolute right to examine certain records of the commission or only a qualified right to be exercised subject to certain votes of the commission. The respondents have argued that this court lacks jurisdiction to interfere with the conduct of the investigation by the commission or in a matter involving the internal management of the commission. I do not reach these questions.

It seems to me elementary that the petitioner has the right to examine the records in order properly to perform the duties of his office. One such duty is that of participation as a member of the commission in the appointment and removal of officers and employees, including inspectors. G. L. (Ter. Ed.) c. 28, § 4. Among such duties is that of participation in the investigation which the commission has voted to undertake. To participate effectively, he should be allowed to prepare himself beforehand if he so chooses. I rule that the original vote of the commission to undertake the investigation has not deprived the petitioner of the right of inspection of the records and papers; and that he is presently entitled to examine such records and papers, and is not compelled to wait until November 15, 1950, or until such other time as the commission may begin its investigation as a body. The petitioner's right is a part of a general right, and related to a general duty, to keep himself informed as to the business of the commission. The action of the commission is a substantial denial of this right.

I have been referred to no case barring a public officer from access to records or papers with which he is concerned as part of his official duties. The absence of any such authority impresses me as most significant. In such investigations as I have made, I have found no case denying similar access even to a mere director of a private business corporation. On the contrary, every such case I have found serves to show that a director may examine corporate records and papers without the permission, and indeed against the vote, of a majority of the board of directors. *State* v. *Missouri-Kansas Pipe Line Co.*, 42 Del. 423. *Leach* v. *Davy*, 199 Mich. 378. *Drake* v. *Newton Amusement Corp.*, 123 N. J. L. 560.

People v. *Throop*, 12 Wend. (N. Y.) 183. *People* v. *Central Fish Co.*, 117 App. Div. (N. Y.) 77. *Wilkins* v. *M. Ascher Silk Corp.*, 207 App. Div. (N. Y.) 168, affirmed 237 N. Y. 574. *Machen* v. *Mayer Electrical Manuf. Co.*, 237 Pa. 212. *Strassburger* v. *Philadelphia Record Co.*, 335 Pa. 485. *State* v. *Frederickson*, 133 Wash. 28. *State* v. *Grymes*, 65 W. Va. 451. *State* v. *Ice*, 75 W. Va. 476. 13 Am. Jur., Corporations, § 1025. 19 C. J. S., Corporations, § 780, 22 A. L. R. 59. 80 A. L. R. 1510. 174 A. L. R. 275. Ballantine, Corporations, § 165. Fletcher Cyc., Corporations (Rev. ed.) § 2235. Thompson, Corporations (2d ed.) § 4520. The basis in reason for the rule is that a director may better serve the corporation and its stockholders. It cannot be that the standard of service expected of this public officer by the Commonwealth and its citizens is in any respect inferior.

The respondent Donnelly has no independent authority, but acts only at the direction of the respondent commissioner or of the commission. An order against him is in no way necessary to the enforcement of the petitioner's right. I exercise my discretion against the issue of a writ against the respondent Donnelly.

An order is to be entered dismissing the petition against the respondent Donnelly. A writ of mandamus is to issue as prayed for against the respondent commissioner and respondent associate commissioners.

October 17, 1950 /s/ RAYMOND S. WILKINS
Justice, Supreme Judicial Court

AN ACT RELATIVE TO COUNSEL FEES AND CERTAIN OTHER EXPENSES IN THE PROBATE COURTS

CHAPTER 312 OF 1951

Chapter 215 of the General Laws is hereby amended by inserting after section 39A the following section:—*Section 39B.* When a decree is entered in a contested proceeding in equity or on an account or to determine the construction of a will or of any trust instrument or to determine any question as to the powers, rights or duties of any fiduciary under any written instrument or to determine any question with respect to services rendered by any such fiduciary or the compensation of such fiduciary for such services, the probate court may, in its discretion as justice and equity may require, provide that such sums as said court may deem reasonable be paid out of the estate in the hands of such fiduciary to any party to the proceeding on account of counsel fees and other expenses incurred by him in connection therewith. The sums awarded shall be specified in the decree which may in such case direct that any sum so awarded to any party be paid in whole or in part to his counsel. The probate court, subject to appeal, shall have like powers when entering a decree after the coming down of a rescript from the supreme judicial court unless the rescript shall specifically direct otherwise. The counsel of any party to whom an award might be made under this section on account of counsel fees or expenses may file and prosecute in his own name a petition under section thirty-nine A for the payment directly to him of any sum or sums which the court would have power to award to the party. A person interested, whose counsel would have standing hereunder or under section thirty-nine A, shall have standing to file and prosecute a petition for the determination of any sum or sums which the court would have power to award against such person.

Approved May 14, 1951.

NOTE

On the History of Statutes and Decisions

While this does not profess to be an exhaustive study, its contents may prove helpful to the bench and bar.

The historical background of the subject appears in the Report of the Commissioners on the Revised Statutes of 1836. The Statute as to "costs" (not including counsel fees), which later developed into the present Section 45 of G. L. Chapter 215, was R. S. C. 83 § § 47, 48). In submitting it (as ss. 45-46 of the report of the Commissioners on the Revised

Statutes) the commissioners said (see Note, Report 3rd Part, p. 32),

"Sect. 45. By stat. 1817, 190, the courts are authorized to award costs 'to either or both parties,' as justice shall require. Nothing is said of their being paid out of the estate, but when awarded to both parties there seems to be no other fund out of which they can be paid; and even when awarded to one party alone, as to an executor or administrator defending the interests of heirs or creditors, it is sometimes more just that they should be paid out of the estate, than by the adverse party. It is accordingly proposed in this section, in accordance with the practice in courts of chancery and ecclesiastical jurisdiction, to empower the courts to award them to be paid either by the parties, or out of the estate, as the circumstances of each case shall require."

That note of 1836 is the background of all later statutes and decisions on the and the controlling words "as justice and equity may require" provide the ultimate test. They appear in the present Section 45 of chapter 215 (in italics) as follows:

"Section 45. In contested cases before a probate court or before the supreme judicial court on appeal, costs and expenses in the discretion of the court may be awarded to either party, to be paid by the other, or may be awarded to either or both parties to be paid out of the estate which is the subject of the controversy, *as justice and equity may require.* In any case wherein costs and expenses, or either, may be awarded hereunder to a party, they may be awarded to his counsel or may be apportioned between them. Execution may issue for costs awarded hereunder."

In addition to this section are the commissioners note expressly referring to chancery practice although equity was then strictly limited in Massachusetts, and sections 39, 39A, of Chapter 215, Chapters 80 and 312 of 1951 (the latter quoted above) making five statutes relating to counsel fees in Probate Courts, the later statutes allowing counsel to petition in his own name, thus making him, to that extent, *but only to that extent,* a party to litigation.

It would be well to read Lewis, Executor v. Natl. Shawmut Bank 303 Mass. 189 and Dillon's Case, 324 Mass. 112 (as to Industrial Accident Board) which preceded the statutes of 1951. See also *Hayden* v. *Hayden* 1950 A.S. 1321, at p. 1329 (as to divorce cases).

Probate courts had limited jurisdiction (gradually expanded) until the early nineties when they were given broad

equity jurisdiction within their field concurrent with supreme and superior courts (see G. L., c. 215, s. 6). In 1884, by c. 131, they were allowed to award fees as part of the "expenses" referred to in s. 45 but they were awarded to parties and not directly to counsel.

In *Mullowney* v. *Barnes,* 266 Mass. at p. 54 such costs "as between solicitor and client" "cannot be allowed . . . after a final decree has passed in the cause *to which they are a mere incident.*" (See also *Boynton* v. *Tarbell,* 272 Mass. at pp. 144-5 where "the standard" was stated as "the general rule" to be "the compensation paid to public officers for services of a similar character"). That "standard" had been stated by the court in *Frost* v. *Allen,* 6 *Allen* at p. 165, not as "an exact rule" but subject to "discretion as to each case, a discretion which shall take into consideration among other things the amount *in controversy,* and which will prevent the fund from being either entirely or in great part absorbed by counsel fees."

Reference was made to 3 Dan. Ch. Pr. 1580. That was in 1863.

As we understand the law, courts with full equity jurisdiction have always had discretionary authority to award costs "as justice and equity may require" as part of their "general jurisdiction" (cf. *Boynton* v. *Tarbell,* 272 Mass. at p. 144) and while that authority in the Probate Courts is statutory under s. 45 it is similar as part of the equity jurisdiction conferred upon them so that s. 45 has become declaratory except as to awarding costs to counsel rather than to parties as "expenses".

With the change in economic conditions and rising costs of the lawyers' overhead, fees have naturally increased and these factors are taken into consideration by courts in fixing fees—the only legal test being "reasonable compensation" under the circumstances of each case. The late Mr. Justice Holmes used to be quoted as saying that the practice of the court was to be "reasonably mean" in the allowance of fees, in order to protect the estate as stated by the court in *Frost* v. *Allen* above quoted. Times have changed since then.

The interpretation of a testamentary or other trust or the conduct of fiduciaries is always a matter of equity as trusts

originated and exist only in equity. In recent years the authority of courts to award fees directly to counsel has been extended by statute, as in Workmen's Compensation cases and by s. 39A of chapter 215 inserted by St. 1947, c. 536. relating to administration of estates and by the earlier addition of the last two sentences of s. 45 of c. 215 already quoted but until s. 39A counsel had no standing to apply personally to the court to establish his compensation. By the recent chapter 80 of the acts of 1951 sec. 39A of chapter 215 was extended to allow counsel to apply to the court directly, by the addition of the words "For the purposes of this section, the term estate shall be deemed to include trusts, guardianships, conservatorships and all other relationships involving the administration of property by fiduciaries."

The practice of the supreme court in equity in allowing fees on bills for instructions is illustrated in the opinion of Mr. Justice Dolan in *Young* v. *Jackson*, 321 Mass. 1. That was a petition for instructions as to whether a testamentary trust terminated on the death of a certain life tenant. The trustees and five interested respondents with separate counsel appeared including certain remotely interested "heirs" represented by counsel, and a guardian ad litem. The court having decided that the trust had not terminated, etc., closed its opinion as follows,—"Reasonable allowances for costs and expenses of the proceedings before us may be allowed to the respondents participating therein or to their counsel in the discretion of the probate court. The compensation of the trustees is properly the subject of their subsequent accounting. *Frost* v. *Hunter*, 312 Mass. 16, 22. That of the guardian ad litem is provided for by G.L. (Ter. Ed.) c. 201, s. 35."

There is another aspect of the present statutes already referred to which, perhaps, deserves notice.

Section 6 of chap. 215 (gradually developed as explained in *Mitchell* v. *Weaver*, 242 Mass. 331 at 336-7) has provided ever since the nineties that

> "Probate courts shall have jurisdiction *concurrent with the supreme judicial and superior courts" etc.*

Three courts, therefore, have original jurisdiction over all trusts, testamentary or otherwise, etc. Section 45 of chapter

215 applies in terms only to the probate courts and the supreme judicial court "on appeal".

Sections 39 and 39A as amended apply *in terms* only to the original jurisdiction of probate courts, subject, of course, to appeal. So far as the statutory words go the jurisdiction to award costs of a single justice of the supreme court and the superior court *appear* to be governed by general equity practice rather than the statutory provisions of s. 45. The statutory authority to award fees (as expenses) directly to counsel and authorizing counsel to apply for them personally appear to be limited to the probate courts and on *appeal only* to the full bench. Compare G.L. chap. 261, s. 13, Crane, 254 Note 2. This creates rather a curious situation because the award of fees to counsel directly (thus making counsel a party to that proceeding) would not apply if a bill in equity for interpretation of a trust is brought in the supreme judicial or superior courts.

Certain other matters should be noticed. *First*, that Chapter 312 authorizes the award of fees *after* rescript from the supreme court unless that court specifically directs otherwise. This is to remove doubts which now exist in the minds of probate judges and lawyers. Apparently the doubt is justified as the court said in *Carchia* v. *Kalayjian*, 264 Mass. 230 at p. 232,

> "Where the rescript is silent as to costs, neither party is entitled to costs in the *full court*." (cited in *Guthrie* v. *Canty*, 315 Mass. at p. 728 and see Crane Court Rules annotated 63-4.)

In addition to the Massachusetts statutes certain New York Statutes are in the background, as pointed out in *Miller* v. *Stern* 195 Advance Sheets 991 at pp. 995-997. In that case under our section 39A it was held that the section 39A did not cover fees to unsuccessful contestants of a will and reversed an allowance for that purpose. It seems a sound decision for the reasons stated in the opinion. Chapter 312 of 1951 does not affect that case at all. The N. Y. act which formed the background of section 39A *before* its amendment of this year, appears in Gilbert-Bliss "Civil Practice of New York Annotated" Book 13 article 12—section 231a which reads,

> "Compensation of attorneys.
>
> "At any time during the administration of an estate, and irre-

spective of the pendency of a particular proceeding, the surrogate shall have power to hear an application for and to fix and determine the compensation of an attorney for services rendered to an estate or to its representative, or to a devisee, legatee, distributee or any person interested therein; or in proceedings to compel the delivery of papers or funds in the hands of such attorney.

"Such proceeding shall be instituted by petition of a representative of the estate, or a person interested, or an attorney who has rendered services. Notice of the application shall be given in such manner as the surrogate may direct. The surrogate may direct payments therefor from the estate generally or from the funds in the hands of the representative belonging to any legatee, devisee, distributee or person interested therein.

"In the event that any such attorney has already received or been paid a sum in excess of the fair value of his services as thus determined, the surrogate shall have power to direct him to refund such excess."

The first note to this section reads:

"Purpose. This section was intended to protect the attorney and the rights of the beneficiaries or client equally. Payment may be directed to the attorney for the representative from the general estate; to the attorney for a beneficiary out of the beneficiary's share; in extraordinary and exceptional cases from the general estate where the attorney for a person interested rendered services benefiting the general estate. But there is no indication the attorney for an individual party should be paid out of the shares of other individual parties. Matter of Winburn (1936), 160 Misc. 49, 289 N.Y.S. 717.

"The attorney may petition to have his fees fixed if he cannot come to an agreement with the administratrix. Matter of Foley (1926), 126 Misc. 672, 215 N.Y.S. 140."

This section applies only to administration of an estate like our 39A *before amendment.* It is obviously a two way street for client or attorney and does not refer merely to the "general" estate. Accordingly Chapter 312 of 1951, provides a two way street in its last sentence. This is similar to the attorneys lien act chapter 221, s. 50 as amended by St. 1945, c. 397 providing that "upon request of the *client* or attorney" the lien may be determined.

The New York act similar to, but longer and more detailed than our s. 45 relative to wills, trusts, etc. is section 278 as amended most recently in 1946. (See Cumulative Supplement 1950, p. 149). So far as we have discovered, in the time at our disposal, the *general* practice under those sections is similar to our practice under 39A and 45.

The New York statutes do not appear to list the factors to be considered in fixing fees as is done in s. 39A. The listing in 39A appears to be directed at the old practice already referred to as stated in *Frost* v. *Allen,* that compensation should be measured by the standard of public officials for similar services, but while a reasonable increase in the amount of the fees allowed may properly follow the change in economic conditions and costs of everything, it is still the business of courts to anticipate and prevent "rackets" and the business of counsel to remember that while they can petition for fees, *they are not parties to litigation* and the amount of fees which a court may allow from a trust fund is obviously and constitutionally limited by the equitable phrase "as justice and equity may require." Whether that phrase appears in a statute or not, no legislation could legally authorize any other ultimate test. Fortunately many, and probably most, fees are generally settled by agreement of parties so that the courts do not have to be bothered. If any one finds any error in this note we shall be glad to receive comments. Compare the discussion of fees by the Judicial Council in its 24th report (reprinted in 33 M.L.Q. pp. 49-50), an extract from which will be found herein on p. 58. F. W. G.

ALCOHOLISM

Statutes Referred to the Judicial Council

Suggestions from Bench & Bar Requested

The Special Commission on Alcoholism (created in 1947 for continuous study of the subject) in its 3rd report (Senate 532 of 1951) recommended

"that the Judicial Council make a study of the existing statutes relating to alcoholism, with the object of making it possible to rehabilitate a large proportion of the alcoholics who are now treated as purely correctional problems.

It has been estimated by the Department of Correction that the cost of caring for alcoholics in the jails and houses of correction of Massachusetts and the State Farm at Bridgewater amounts to $1,000,000 a year. It has been demonstrated that the expense to the State of rehabilitating an alcoholic is in the long run far less than treating him as a law breaker, to say nothing of the indirect benefits to his family and his community.

The Commission has been heartened by the evidence of deep interest and understanding and vigorous support which the Governor and General Court contributed to the program on alcoholism."

JAMES M. FAULKNER, M.D., *Chairman.*
ROBERT E. FLEMING, M.D. ARTHUR DESMOND.
SARAH JORDAN, M.D. GEORGE WISWELL.
CHARLES W. GAUGHAN, *Executive Secretary.*

By Resolves, Chapter 11, the subject matter was referred to the Council as recommended with a request for a report.

The present commission is active, knows what it is about and is thoroughly familiar with the contents of the report of 1945 supplemented by their own wide experience. (See reports herewith.) The obvious reason for their brief recommendation in S.532, and the reference to the Council, is that the commission and the legislature want the assistance of the judgment of the Council about the relation of the courts to the facts contained in the report of 1945 as well as of increasingly common knowledge in the community.

The Council, of course, is not equipped to make an independent investigation of the facts about alcoholism in general, but that was done by the earlier special commission of 1943, and especially by its chairman Judge Zottoli, with exceptional thoroughness and with the assistance of Chief Justice Bolster and the long list of experienced doctors and others in close touch with the facts (Supp. 64-65) of the report (H. 2000 of 1945). Suggestions from anybody will be welcomed.

The " existing statutes" referred to are few. They appear to be:

1. G.L. C. 272 § 53 as amended by ST. 377 of 1943 relative to commitment of "common drunkards" and a list of other varied offenders to jail or house of correction, or state farm, for not more than 6 months. See also § 66 as to "vagrants", sometimes used for drunks.

2. Chap. 127 § 136A, inserted by ST. 1941 C.690 § 2 as amended by ST. 1951 C.33. This authorizes the Commissioner of Correction to release persons held solely by reason of a sentence for drunkenness. The power to release was formerly in the Parole Board. The chapter 33 of 1951 extends the commissioner's power of release to county institutions to which a drunk has been transferred.

3. Chap. 272 § 45 allowing release by the court if not arrested 4 times within a year. Ch. 274 of 1946 made the release mandatory by substituting the word "shall", and Ch. 409 of 1947 restored the word "may" so that it is again discretionary. The restoration of the discretionary "may" resulted from the recommendation of the Judicial Council in its 22nd report for reasons stated on P.64. The mandatory provision caused much trouble.

The discussion of the "release" law as administered appears on pp. 24-27. The discussion of the results of nol pros and filing on pp. 27-30 and more fully on pp. 224-228 followed by charts of penological and hospitalization records pp. 229-259. These records are doubtless the most extreme records, but illuminating.

In dealing with chronic drunks, or those nervous, worried, "escape" drinkers on the way to that state, outside of the criminal courts, there have been great advances in the last 15 or 20 years. Civil guardianships, have always been one way and, more recently, Alcoholics Anonymous, medical clinics like that at the Peter Bent Brigham and elsewhere and the Yale Alcoholic studies have done much.* In all the penal institutions, we understand, subject to correction, the drunks are mixed up with all kinds of other inmates and the modern methods of helping them are sketchy or simply not used or cannot be adequately used.

In this second report (H. 2086 of 1950) the commission said:

1. Activities of the Commission.

The present Commission on Alcoholism was activated in January, 1948. The first year was devoted to an intensive study of the problem in the Commonwealth. Meetings were held with penologists, judges, educators, clergymen, physicians, representatives of state departments dealing with the alcoholic, police, and representatives of lay organizations such as the W. C. T. U., Boston Retail Liquor Dealers Association, Alcoholics Anonymous, and the United Prison Association. Visits were made to the New Hampshire Commission on Alcoholism in Concord, New Hampshire, and to the Connecticut Commission in New Haven, as well as to the Bridgewater State Farm, Deer Island and the Washingtonian Hospital.

* A recent book, "The Other Side of the Bottle" by Dwight Anderson and Page Cooper, published by A. A. Wyn, Inc. in 1950 contains a personal account by an "alcoholic", who graduated from alcohol, written to help others. It is not a "prohibition" tract.

At the end of the first year of study, the Commission came to certain conclusions. In brief, these were—

1. The problem of alcoholism in the Commonwealth of Massachusetts is immense. From the economic point of view, the earlier Commission on Drunkenness estimated the annual cost of alcoholism to various governmental agencies in the Commonwealth to amount to $61,000,000.

2. Alcoholism in the Commonwealth is, in accordance with existing statutes, regarded officially as a penal problem. This traditional approach has amply demonstrated its general ineffectiveness. It is, furthermore, irrational and expensive.

3. The problem is a many-sided and complex one. In planning an attack upon it, it is recognized that while the campaign must be waged upon many fronts, the best use of limited resources dictates opening the offensive where the greatest advance may be expected with the least expenditure.

4. The studies of the Commission indicated that one line of attack which had already demonstrated its effectiveness in the Commonwealth, as well as elsewhere, was the establishment of outpatient clinics for alcoholics.

On the basis of its investigations, the Commission last year recommended the support of alcoholic clinics in the following hospitals: the Peter Bent Brigham Hospital, Boston; the Quincy City Hospital; the Worcester City Hospital; and the Pittsfield General Hospital. The Commission was aided and encouraged by Dr. Clifton T. Perkins, Commissioner of Mental Health. . . .

The primary objective of these clinics, of course, would be to provide a treatment center where alcoholics could go for assistance, or to which they might be referred by their families, friends, physicians, clergymen, Alcoholics Anonymous, judges, parole officers or social workers. Experience with such a clinic by one of the members of the Commission indicates that approximately 50 per cent of patients referred to the clinic may be "cured" at relatively little expense.

An important by-product of an alcoholic clinic is its educational value to the whole community which it serves. Discussion of the alcoholism problem in the past has too often given rise to more heat than light. The alcoholic clinic serves as a natural center for unbiased, up-to-date information on this subject. . . .

It is hoped that . . . it may be possible in the course of a few years to point to a group of several hundred rehabilitated alcoholics and to arrive at cost figures which will be significant. It seems reasonable to expect that this will be a profitable investment for the State, both financially and in terms of human welfare.

The work of the office during the past year [1949] has broken down into four main categories:

1. Research, which includes a review of reports and articles of many phases of alcoholism culled from American and foreign publications; and specific studies such as the one on what and how

alcoholism is being taught in the secondary schools of Massachusetts.

2. Education, including interviews by college and lay students of the problem; and going over into the field of public talks on alcoholism of which the members and executive secretary of the Commission gave more than fifty.

3. Referral services, by means of which more than one hundred and fifty alcoholics or relatives and friends of alcoholics were assisted to proper treatment facilities. Though the Commission office does not recognize this as a function which it is staffed to do well at the present time, it is willing to help individuals in so far as it can.

4. Administration, including the work with hospitals and committees in which clinics are being established; the overseeing of vital statistics and methods of treatment, which function is the primary responsibility of the Commission.

Suggestions should be sent to the Secretary of the Judicial Council of Massachusetts, 60 State St., Boston 9.

(Continued from p. 54)

COUNSEL FEES

Extract from 24th Report of the Judicial Council

"The problem of determining what is reasonable compensation for lawyers' services and the services of others under the circumstances or particular cases, is not always an easy one. The problem may differ in different localities. The overhead cost of well equipped lawyers' offices for the general practice of the constantly expanding range of work which lawyers are called upon to do, differs materially, in some counties in the Commonwealth, from the overhead in the larger cities and particularly in Boston where the greater bulk of the legal work of the Commonwealth is done. The cost of rent, clerical service, well equipped libraries for prompt reference in the larger offices, is greater. These factors have to be taken into consideration. Nobody likes lawyers' fees, but the general test of such fees, because of the different conditions and cost above referred to, differ in the different localities and have to be adjusted to the general state of mind of the local community of clients. The value of the services of some lawyers often differs from that of other lawyers. All these factors have to be taken into consideration and in spite of the difficulties of determining such a question, we believe that the standard of reasonable compensation rather than that of mandatory percentages fixed by wholesale in advance by statute, is the wiser and more just test. It is the test which is applied in regard to the charges of lawyers and others in other court proceedings."

THE OPINION IN THE CASE OF THE INITIATIVE PETITION RELATIVE TO OLD AGE ASSISTANCE VOTED ON AT THE ELECTION IN NOVEMBER 1950

President Sears, in his report at the annual meeting on June 9, referred to the petition for mandamus brought by the eleven members of the executive committee. The petition was printed in full (with a summary of the demurrer and answer) in the "Quarterly" for December 1950. As this is the first case under the "I and R" amendment in which the question of constitutionality of the proceedings has been raised *after a popular vote,* and, as the opinion clarifies the constitutional limitations of the "I and R" procedure, it is printed in full from the Advance Sheets pp. 529-545 for convenient reading by the bench and bar.

Ed.

SAMUEL P. SEARS & others *vs.* TREASURER AND RECEIVER GENERAL & another

(and a companion case[1]).

Suffolk, April 2, 3, 1951.—May 3, 1951.

Present: QUA, C.J., LUMMUS, WILKINS, SPALDING, & COUNIHAN, JJ.

Constitutional Law, Initiative. *Old Age Assistance. Public Welfare. Mandamus. Equity Jurisdiction,* Taxable inhabitants' suit Laches. *Public Officer. Jurisdicion,* Justiciable question. *Statute,* Validity. *Secretary of the Commonwealth. Equity Pleading and Practice,* Bill. *Laches. Words,* "About to expend money," "Description," "Summary."

Reservations and reports, without decision, by *Counihan,* J., and *Ronan,* J., respectively, of cases in the Supreme Judicial Court for the County of Suffolk.

QUA, C.J. The first of these cases is a petition by eleven citizens of the Commonwealth "interested in the execution of laws" against the Treasurer and Receiver General and the commissioner of public welfare, praying for a writ of

[1] The companion case is that of Benjamin M. Ellison and others against Treasurer and Receiver General and others.

mandamus to command the respondents to refrain from paying out any money or taking any action whatever under a purported law proposed by the initiative which was voted upon favorably at the State election in November, 1950, and which would strike out c. 118A of the General Laws in its entirety and substitute therefor a new c. 118A containing many provisions substantially different from those of the existing law. It is alleged that in several enumerated particulars the new law was not adopted within the requirements for intiative laws laid down in arts. 48 and 74 of the Amendments to the Constitution.

The second case is a petition in equity brought under G. L. (Ter. Ed.) c. 29, § 63 inserted by St. 1937, c. 157, by forty-six taxable inhabitants of the Commonwealth against the Treasurer and Receiver General, the commissioner of public welfare, the Secretary of the Commonwealth, and the comptroller, praying that the respondents be enjoined from expending any moneys of the Commonwealth in payment of any debts, obligations, or commitments arising out of, or expending any moneys of the Commonwealth in connection with, the purported new c. 118A. This petition also attacks the constitutionality of the new law on grounds in general similar to those relied upon in the first case.

In the first case the respondents demurred jointly. In the second case the respondents demurred on grounds common to all, and each respondent also demurred on grounds applicable only to himself. The respondents in each case answered without waiving their demurrers. Each case comes here upon reservation and report by a single justice upon the demurrers, the answers, and a stipulation in each case as to certain agreed facts. As the demurrers in the two cases differ materially, it will be convenient to discuss them separately. The merits in the two cases can readily be considered together.

The Demurrer in the First Case.

The demurrer in this case asserts that the petition is "replete with extraneous matter" consisting of references to the petitioners' connection with an organization not involved in the subject matter, of "declamatory allegations," of quotations from, or paraphrases of, the Constitution or of its

alleged effect, of conclusions of law, of argumentative statements, and of incompetent quotations from a certain publication; and that the petition should not be entertained because of its "discursiveness" and because of its "unduly large content" of incompetent, irrelevant, and prejudicial allegations. Undoubtedly substantial portions of the petition are open to one or more of these objections. A bill or petition may be so overloaded with such matter as to obscure the cause of action intended to be stated and to render the preparation of an answer unduly difficult, and so to call for the sustaining of a demurrer. *Davis* v. *H. S. & M. W. Snyder, Inc.* 252 Mass. 29, 36-37. *Taylor* v. *Neal,* 260 Mass. 427, 439. *Christiansen* v. *Dixon,* 271 Mass. 475. *Cole* v. *Cole,* 277 Mass. 50. *Bowles* v. *Clark,* 326 Mass. 31.[1] But in our opinion the petition in this instance does not call for such drastic treatment. The objectionable matter is readily separable. Much of it is common knowledge or self evident. It does not obscure the cause of action intended to be set forth, which is stated with clarity and reasonable conciseness. The objectionable matter could easily have been struck out on motion, if it had been thought worth while to file such a motion. It can now be treated as mere surplusage to which no attention will be paid. See *Jones* v. *Dow,* 137 Mass. 119, 121; *Feldman* v. *Witmark,* 254 Mass. 480, 482; *Fahy* v. *Melrose Free Press Inc.* 298 Mass. 267, 269; *Ingalls* v. *Hastings & Sons Publishing Co.* 304 Mass. 31, 35; *Enga* v. *Sparks,* 315 Mass. 120, 124-125; *Coburn* v. *Moore,* 322 Mass. 204, 205-206.

The demurrer in this case also sets up the grounds that the petitioners have no interest in the subject matter of the petition, and in any event that they have another adequate remedy. Both of these contentions are answered by *Brewster* v. *Sherman,* 195 Mass. 222, 224, and subsequent decisions. In *Brewster* v. *Sherman* a single petitioner was allowed to maintain a petition for a writ of mandamus to correct an error of the registrars of voters of a town in counting a ballot on the issue whether licenses should be granted for the sale of intoxicating liquors. The petitioner had no private interest in the subject matter and no interest at all different from that of other voters and taxpayers of the town. He was

[1] Mass. Adv. Sh. (1950) 699.

allowed to maintain the petition on the ground that the question was "one of public right," and that the object of the petition was "to procure the enforcement of a public duty," the people as a whole being "regarded as the real party in interest." This principle was foreshadowed as early as *Attorney General* v. *Boston,* 123 Mass. 460, 479. It was applied to a case of the same general type as the present case in *Brooks* v. *Secretary of the Commonwealth,* 257 Mass. 91, where are collected many decisions which had accumulated since *Brewster* v. *Sherman.* It was again applied to such a case in *Morrissey* v. *State Ballot Law Commission,* 312 Mass. 121, at pages 131-132, where are collected more recent decisions, and it was applied again in such a case, without discussion, in *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 236-237. It was applied in *Loring* v. *Young,* 239 Mass. 349 (see pages 357-358), where, as here, the question was which of two purported laws (in that case drafts or forms of the Constitution) was the law actually in force. See *Prescott* v. *Secretary of the Commonwealth,* 299 Mass. 191, 194; *Parrotta* v. *Hederson,* 315 Mass. 416, 418-419; *Lincoln* v. *Secretary of the Commonwealth,* 326 Mass. 313.[1] We accept the principle as fully established without further citation of the numerous cases that might be cited in its support. It is applicable here.

What has been said in effect also disposes of the contention that the petitioners have another adequate remedy and so cannot maintain a petition for a writ of mandamus. The other remedy suggested by the respondents as adequate is a petition under G. L. (Ter. Ed.) c. 29, § 63, inserted by St. 1937, c. 157, to prevent the expending of moneys of the Commonwealth in connection with the new purported law, that is to say, a petition similar to that in the second case now before us. We do not consider the statutory remedy, aimed as it is only at the expenditure of money, as an adequate substitute for the broader remedy under the principle hereinbefore discussed. That remedy goes beyond the mere matter of the expenditure of money. It extends to all governmental action having to do in any way with the enforcement of the new law, even if no expenditure of money is

[1] Mass. Adv. Sh. (1950) 1011.

involved. It covers activities which cannot be reached by the statutory proceeding. It settles by the direct judgment of the court the entire issue as to whether one purported law or the other will govern the subject matter. In short, the real question here is much more than a question of money. It is whether it is the public duty of administrative officers of the Commonwealth to administer an important public service according to one statute or according to another and different statute. It is not, as in *Tuckerman* v. *Moynihan*, 282 Mass. 562, 568-569, a question of the performance of what for the lack of a better term may be called a "private" duty owed to the Commonwealth regarded as a corporation. That case is distinguishable. It might well be that the reasoning of the court in a proceeding under c. 29 § 63, would necessarily indicate whether or not the new law was valid, but that cannot, we think, be considered the full equivalent of a writ of the court directly and finally commanding the duties of public officers in all respects in relation to the new law. For these reasons we think that this case is distinguishable from *Finlay* v. *Boston*, 196 Mass. 267, where the petition was held to be in effect one to prevent the illegal expenditure of public money, and from other cases relied upon by the respondents, where it was stated or held that the existence of another remedy foreclosed any remedy by mandamus.

Another ground of demurrer is that the petition does not sufficiently allege "the right, power, duty, authority or intent of the respondents or either of them to take or refrain from taking the action or actions referred to in the petition." It is plain, however, that if the new law is valid, the Treasurer and Receiver General will have duties to perform in relation to its financial provisions and to the reimbursement of cities and towns for sums paid out by them for old age assistance, and since the new law would be administered under the supervision of the department of public welfare, the commissioner of public welfare, under G. L. (Ter. Ed.) c. 121, § 2, would have charge of its administration and enforcement. There is, to be sure, no express averment that these officers will attempt to put the law into effect, and there is no averment that any appropriation has yet been made which can be expended for that purpose; but as a practical matter it

seems a necessary inference that where a law has been voted upon favorably by the people at an election, in the absence of any decision to the contrary, these officers will in all probability assume its validity and act accordingly, and that appropriations will be made as required by art. 48, "The Initiative," II, § 2, on the assumption that the law is valid. We think that action by the respondent officers is shown to be sufficiently imminent to warrant the bringing of the petition. Requirements of allegations of this sort must not be made so strict that there is serious danger that suit cannot be brought in time to prevent illegal action.

Still other grounds of demurrer involve matters of substance which are the same in both cases and are covered by what is hereinafter said in dealing with the merits.

The Demurrer in the Second Case.

There is nothing in the contention that in a ten taxable inhabitants petition only one department or officer can be made respondent, or in the contention that the petition is multifarious because it refers to more than one transaction. If several departments or officers are about to play their respective parts in an illegal expenditure or in a connected course of illegal expenditures it would be absurd to require a separate petition for each officer and each expenditure.

It is further asserted that there are no allegations that appropriations have yet been made, and that illegal action is not alleged to be sufficiently imminent to justify bringing the petition. We have already dealt with a similar ground included in the demurrer in the first case. In this second case, however, our attention is directed to Fuller v. Trustees of Deerfield Academy, 252 Mass, 258, 260. See Amory v. Assessors of Boston, 310 Mass. 199, 205. The petition in the Fuller case sought relief wholly with respect to past transactions, and that relief was denied. But on page 260 in discussing the case of Carlton v. Salem, 103 Mass. 141, the court may possibly have failed to give full recognition to the fact that subsequently to the Carlton case the statute had been completely redrafted and broadened by St. 1898, c. 490, § 1, and that the precise requirement that the town must have voted "to raise [money] by taxation or pledge of its credit, or to

pay from its treasury" had been superseded by the simple provision, "When a city or town or any of its officers or agents are about to raise or expend money or incur obligations . . ." *Dowling* v. *Assessors of Boston*, 268 Mass. 480, 483. This is, in substance, the language still appearing in G. L. (Ter. Ed.) c. 40, § 53, and in so far as affects this case, it is, in substance, the same as the language appearing in G. L. (Ter. Ed.) c. 29, § 63, inserted by St. 1937, c. 157, under which this second case is brought. Even before the broadening of the statute it was held in *Prince* v. *Crocker*, 166 Mass. 347, 358, that it should be given "a somewhat liberal construction," and that the acceptance by the voters of the city of Boston of a statute providing for the building of subways to pay for which bonds were to be issued was in itself, without more, a sufficient foundation for the filing of a petition. Notwithstanding some dicta in *Fuller* v. *Trustees of Deerfield* Academy which perhaps might be thought to indicate a more exacting standard, we think that a department or officer of the Commonwealth is "about to expend money" within the meaning of § 63 whenever, as in the present case, it appears that, if events take their normal course, if no extraordinary intervention occurs, and if there is no restraint by the court, it or he will pay out money or take part in paying it out. See *Reilly* v. *Selectmen of Blackstone*, 266 Mass. 503, 511; *Morse* v. *Boston*, 253 Mass. 247, 249-251, 255; *Burt* v. *Municipal Council of Taunton*, 272 Mass. 130, 131-132.

The petitioners have sufficient interest to maintain this petition. They are "not less than twenty-four taxable inhabitants of the commonwealth, not more than six of whom . . . [are] from any one county." They bring themselves within the express words of the statute. G. L. (Ter. Ed.) c. 29, § 63, inserted by St. 1937, c. 157. In *Richards* v. *Treasurer & Receiver General*, 319 Mass. 672, it was held that the petition could not be maintained because such provision had been made for reimbursing the Commonwealth for the alleged expenditures that no part of the ultimate burden of those expenditures could fall upon the petitioners. That is not the case here. Under the new c. 118A large sums would be paid out from the treasury of the Commonwealth. There is nothing comparable to the provisions for reimbursement which existed in

the *Richards* case. It is true that the new law attempts to devote the receipts from meals taxes, horse and dog racing licenses, and liquor licenses to the payment of old age assistance, but there is no assurance that these sums would be sufficient, and if they were not the deficiency would no doubt fall in some manner in part upon the petitioning taxpayers, who in any event are subject to meals taxes. As we have already said, § 63 is to be given "a somewhat liberal construction," so that it may serve the intended purpose of preventing illegal expenditures. We are not inclined to search minutely for purely technical and unsubstantial objections. Neither do we see that the interest of a petitioning taxpayer need be any different where the alleged illegality of proposed expenditures depends upon the unconstitutionality of a statute than where it depends upon other causes.

The only allegations in the petition that the respondent Secretary of the Commonwealth will have any part in any illegal expenditure are that he intends to approve vouchers for the payment of money for printing, publishing, and distributing the new c. 118A as part of the laws of the Commonwealth. As against a demurrer this allegation seems to us sufficient, if the new chapter is not in truth a part of the laws of the Commonwealth. See G. L. (Ter. Ed.) c. 5, § 2, as amended by St. 1945, c. 252. The duties according to law of the respondents the Treasurer and Receiver General, the comptroller, and the commissioner of public welfare in connection with payments of moneys by the Commonwealth seem to us sufficiently obvious, and the probability as matter of common knowledge, if not of express allegation, that these officers will attempt to perform these duties in connection with the new c. 118A seem sufficiently great, to render the petition good as against the special grounds of demurrer set up by them. In dealing with the merits we shall have more to say relative to any obligations incurred prior to knowledge of this decision.

Still further grounds of demurrer in this second case will be adequately and more conveniently covered in dealing with the merits.

THE MERITS IN BOTH CASES.

Massachusetts since 1780 has been governed by a written constitution, wherein the various organs of government are

enumerated and their powers defined. The people themselves and all branches of their government, legislative, executive, and judicial alike, are bound by it and owe to it implicit obedience. By that constitution, until the adoption by the people in 1918 of art. 48 of the Amendments, all power to enact laws was vested in the Legislature. By that amendment provision was made whereby in a carefully prescribed manner and with certain precisely defined safeguards designed to make certain that there should exist a wide popular demand, to prevent hasty action, to promote wide publicity, and to acquaint the voters with the proposed laws and with the arguments for and against them, laws could be enacted by direct popular vote, except in relation to certain "excluded matters." Since the people have themselves adopted the Constitution with its amendments for their government, they are bound by the provisions and conditions which they themselves have placed in it, and when they seek to enact laws by direct popular vote they must do so in strict compliance with those provisions and conditions. See *Bowe* v. *Secretary of the Commonwealth*, 320 Mass. 230, 247-248. Failure to comply will mean that no valid law has been enacted, no matter how great the popular majority may have been in its favor. Only by preserving this fundamental principle can constitutional government be preserved and orderly progress assured. The question whether or not the requirements of the Constitution have been observed and a valid law has been enacted is a justiciable question to be determined in the last analysis by the judicial department of the government whenever the question arises in a proper proceeding in court. And since the judges are bound by the Constitution and must see that its provisions and conditions are at all times faithfully observed, they must determine that question with sole reference to the facts of the case and the language of the Constitution and without the slightest regard to their own personal views as to the desirability or otherwise of the law involved.

It is proper to observe at this point that we cannot agree with the argument of the respondents that because the new c. 118A has actually been voted upon and certified by the Secretary of the Commonwealth it is conclusively presumed to be valid whether or not the requirements of the Constitution have been followed. This is a misapplication of the

principle that the enrollment of a statute is conclusively presumed to embody the action taken by the Legislature upon it. *Field* v. *Clark*, 143 U. S. 649. That principle rests both upon the respect due to the legislative branch of the government and upon the confusion which would result if the courts were obliged to inquire as to all statutes into the legislative proceedings prior to enrollment. The first reason has no application whatever to initiative laws and the second reason has little, if any, force in relation to such laws. It would be astonishing and intolerable if the safeguards so carefully inserted in art. 48 could be disregarded without consequences by individual State officers and so in effect turned into mere admonitions and recommendations. The Constitution is not ordinarily treated in that manner. See Cooley, Constitutional Limitations (8th ed.) 159-164. The case of *Field* v. *Clark* was explained in *Wilkes County* v. *Coler*, 180 U. S. 506, 521-524. In the latter case it was held that failure to observe a requirement of the Constitution of a State that a vote by yeas and nays be entered on the journal of the Assembly rendered a law invalid. See *Kay Jewelry Co.* v. *Board of Registration in Optometry*, 305 Mass. 581, 584; *Prescott* v. *Secretary of the Commonwealth*, 299 Mass. 191, 196; *Scullin* v. *Cities Service Oil Co.* 304 Mass. 75, 83-84; *Opinion of the Justices*, 99 Mass. 636, 637; *Opinion of the Justices*, 135 Mass. 594, 600. The great variety of view that exists, even where the question relates to the passage of an act of the Legislature, is indicated by the cases collected in 40 L. R. A. (N. S.) 1.

The constitutional legality of the method by which the new c. 118A was purportedly adopted is attacked principally on the following grounds: (1) that the provisions contained in it for the application to old age assistance of the receipts from meals taxes and from horse and dog racing and liquor licenses constitute "a specific appropriation of money from the treasury of the commonwealth," a matter which by art. 48, "The Initiative," II, § 2, is excluded from an initiative measure; (2) that the measure is substantially the same as one previously submitted to the people at the election of 1946 and was therefore disqualified under "The Initiative," II, § 3, as appearing in art. 74, § 1, of the Amendments; (3) that no vote was taken upon the measure in the General Court, as required by art. 48, "The Initiative," V, § 1, so that it was impossible to

include in the ballots or in the information sent to voters any statement as to the votes of the General Court, as required by "General Provisions," III, IV, as appearing in art. 74, § 4; and (4) that no "fair, concise summary" of the proposed measure was printed at the top of the blanks provided for the use of "subsequent signers" of the initiative petition or on the ballots, as required by "The Initiative," II, § 3, as appearing in art. 74, § 1, and by "General Provisions," III, as appearing in art. 74, § 4. If it were necessary to pass upon all of these contentions, each would require most serious consideration, but since we are clearly of opinion that the requirements of the Constitution were not observed in regard to the "summary," we deem it unnecessary and unwise to discuss the other contentions argued.

"The Initiative," II, § 3, as appearing in art. 74, § 1, provides that "a fair, concise summary, as determined by the attorney-general, of the proposed measure," as it will appear on the ballot, shall be printed at the top of each blank furnished for the use of signers of the initiative petition after the first ten, and "General Provisions," III, as appearing in art. 74, § 4, provides that such summary "shall be printed on the ballot." Before the amendment introduced by art. 74, instead of "a fair, concise summary, as determined by the attorney-general" the wording had been, "a description to be determined by the attorney-general, subject to such provision as may be made by law." Art. 48, "General Provisions," III. Under that wording it had been held after careful consideration that the sufficiency of the"description" presented a justiciable question, notwithstanding that in the first instance the "description" was to be prepared by the Attorney-General. *Evans* v. *Secretary of the Commonwealth*, 306 Mass. 296, 298-299. To the same general effect are *Brooks* v. *Secretary of the Commonwealth*, 257 Mass. 91, 97-99. *Horton* v. *Attorney-General*, 269 Mass. 503, 507-508, *Opinion of the Justices*, 271 Mass. 582, 590-592, *Opinion of the Justices*, 297 Mass. 582, 587-588, and *Opinion of the Justices*, 309 Mass. 571, 587-591. We have no doubt that since the adoption of art. 74 the court has the same serious duty to pass upon the sufficiency of the "summary" as it previously had to pass upon the sufficiency of the "description." See *Bowe* v. *Secre-*

tary of the Commonwealth, 320 Mass. 230, 243. It cannot avoid that duty when the question is duly presented in appropriate proceedings.

Article 74 did, however, make a material change. Before the adoption of art. 74, the requirement was that "a description of the proposed measure" should appear upon the blanks for "subsequent signers" and on the ballot. Art. 48, "The Initiative," II, § 3. "General Provisions," III. Now, instead of a "description," the requirement is "a fair, concise summary." Art. 74, § § 1, 4. The word "description" had been interpreted as implying a very substantial degree of detail and had resulted in very long and cumbersome statements of details of proposed laws. See particularly *Opinion of the Justices,* 309 Mass. 631, 641-644. The change from "description" to "fair, concise summary" was designed to remedy this difficulty and must be given effect to that end. *Bowe* v. *Secretary of the Commonwealth,* 320 Mass. 230, 241-243. Nevertheless, there must be a real "summary." A summary is an abridgment, abstract, compendium, or epitome. The word carries with it the idea that, however much the subject matter may be condensed, the sum and substance of it must remain. No doubt details may be omitted or in many instances covered by broad generalizations, but mention must be made of at least the main features of the measure. And the summary must be "fair"; that is to say, it must not be partisan, colored, argumentative, or in any way one sided, and it must be complete enough to serve its purpose of giving the voter who is asked to sign a petition or who is present in a polling booth a fair and intelligent conception of the main outlines of the measure. It must do more than merely indicate the field of human or governmental activity within which the measure falls. It must go beyond what would serve as the title to a statute. No final definition which will fit every case can be given of the words "fair, concise summary." Each instance must be judged by itself according to the nature of the proposed measure and the character of the "summary" in question.

In the present instance the "summary" was this, "This measure provides for minimum payments of seventy-five dollars per month, or eighty-five dollars per month if blind,

as assistance to deserving aged persons who have reached the age of sixty-three years or over and are in need of relief and support."

The measure thus purportedly summarized is a complete revision of c. 118.[1] It fills nearly eight pages of rather fine print. It necessarily calls for the expenditure of large sums of money. Clearly the voters were entitled to be informed as to how this money was to be obtained. The summary is wholly silent on this important point. It says nothing of the proposed application of the proceeds of the meals taxes, and horse and dog racing and liquor licenses, in part payment at least of the necessary expenses. It says nothing as to whether the burden will fall upon local municipalities or upon the Commonwealth or upon some other unit or district. A voter would have a natural interest in knowing this. The "summary" says nothing as to the public agencies, boards, or officers, whether local or otherwise, through whom the law is to be administered. It says nothing as to the standards for determining "need," or whether there are to be any legal standards. It does not mention that assistance, where required, shall include hospital, convalescent and dental care, false teeth and eyeglasses, or that "Such assistance shall also provide for adequate medical care for every recipient of assistance under this chapter . . .," although it cannot be doubted that these are material provisions having a tendency to increase the burden of the measure upon the public. All these matters not mentioned in the "summary" are the subject of express provisions in the measure itself. We cannot see how a summary that says nothing about them can be held to be "fair." It is true that the proposed measure is intended to be a repeal of and substitute for the existing c. 118A, and that a great many of its provisions are the same as those of the existing law. There are, however, many important differences. It is true that the Constitution requires a summary of the proposed measure and not of the existing law. But the "summary" here used does not mention the fact that the measure is a repeal of and substitute for existing law. Perhaps it may sometimes be possible to draft a "fair" summary merely by pointing out the differences

[1] This measure is printed in full in the Acts and Resolves for 1950, at page 791.

between a proposed measure and the existing law, but at least where that is not done we can see no way to avoid summarizing the entire proposed measure in the manner and to the extent hereinbefore indicated, so that the voter may get a fair comprehension of what the law will be if the measure is adopted. It is plain that this was not done in the present instance. Here the so called "summary" is no more than would fairly serve as a title for the measure. In no sense is it a summary of the contents—much less a "fair" summary. It did not comply with the Constitution. We must so hold and must decide that the new proposed c. 118A was not adopted according to the Constitution and cannot take effect on June 1, 1951, as provided in the proposed chapter.

The respondents in both cases set up the defence of laches. The contention is that suit could have been brought at earlier stages in the initiative process and before thousands of signatures had been obtained and the measure had been submitted to the people. Even as between strictly private litigants there is no hard and fast rule about laches. The questions presented are usually questions of fact. *Moseley* v. *Briggs Realty Co.* 320 Mass. 278, 283. The court must exercise its best judgment according to all the circumstances of each case. *Snow* v. *Boston Blank Book Manuf. Co.* 153 Mass. 456, 458. *Hill* v. *Mayor of Boston,* 193 Mass. 569, 574. *Stewart* v. *Finkelstone,* 206 Mass. 28, 36-37. *Coram* v. *Davis,* 209 Mass. 229, 250. Laches does not run against public rights. *Lincoln* v. *Giles,* 317 Mass. 185, 187, and cases cited. The first of these two cases is brought to determine and enforce public rights in the proper execution of the laws. *Brewster* v. *Sherman,* 195 Mass. 222, 224. An unconstitutional law cannot be made valid by the laches of anyone or by any lapse of time. See *Barney & Carey Co.* v. *Milton,* 324 Mass. 440, 445; *Commonwealth* v. *Parker,* 2 Pick. 550, 557. If final decision is not made in these proceedings, where all points have been amply presented and argued, an unconstitutional and invalid law will remain ostensibly on the books, a continuing source of doubt and confusion. There may be further litigation after enforcement begins and when the inconvenience and disruption to the public service would be far greater than now. As to the second case, it has been held, in effect, that a ten taxable inhabitants petition cannot

be defended on the ground of laches, if brought as soon as the illegal payment becomes imminent. *Copeland* v. *Huntington*, 99 Mass. 525, 529. *Mead* v. *Acton*, 139 Mass. 341, 344-345. *Jenney* v. *Assessors of Mattapoisett*, 322 Mass. 76, 81. In *MacRae* v. *Selectmen of Concord*, 296 Mass. 394, the town had carried on an illegal business for several years before suit was brought. This second case is readily distinguishable from *Conners* v. *Lowell*, 246 Mass. 279. In neither of the cases before us could it have been known that the proposed measure would be voted upon favorably until after the returns of the election were compiled. There was no unreasonable delay after that. Laches is not a defence in either case.

The result of the foregoing opinion is that both petitions can be maintained.

We are of opinion, however, that the relief to be granted ought not to include any order against any respondent in either case forbidding payment of an obligation incurred by the Secretary of the Commonwealth before notice of this decision for the printing of the purported new c. 118A. We do not think that such obligation was illegally incurred. See *Prince* v. *Boston*, 148 Mass. 285, 288-289. It is obvious that the Secretary of the Commonwealth, whose duty it is to print the laws, cannot take it upon himself to determine the constitutionality of each act before deciding to print it. He must perform his statutory duty in a reasonable and practical way. The statute (G. L. [Ter. Ed.] c. 5, § 2, as most recently amended in paragraphs [4] and [6] by St. 1945, c. 252) must be construed reasonably so that he can do so. We do not consider that the question whether the Secretary of the Commonwealth printed the purported law earlier than as provided by the act of 1945 is raised on either record.

For similar reasons we think there should be no interference with the payment of any obligation incurred before knowledge of this decision by the respondent commissioner of public welfare for services in making preparation to put the new c. 118A into operation on June 1 next, when by its terms it would take effect. We think that in the circumstances it was not unlawful to make such preparation in order to prevent confusion and possible breakdown in the system of old age assistance, if the new chapter should be held valid.

It is proper to make ready to meet problems which seem likely to arise, even if in fact they never do arise.

In the first case a peremptory writ of mandamus is to issue commending the respondents named in the petition to continue to act in all respects according to the statutes enacted by the Legislature relative to old age assistance and without regard to the purported adoption by the initiative of the new c. 118A and to refrain from approving or paying any expenses incurred under or in consequence of said new chapter or from giving effect thereto in any manner, except that any obligation already incurred by the Secretary of the Commonwealth for printing the new c. 118A may be recognized and paid and the cost of services incurred by the commissioner of public welfare before knowledge of this decision in preparing to put the new chapter into effect may be recognized and paid.

In the second case a final decree is to be entered perpetually enjoining and restraining the respondents and each of them from incurring any obligations or expending or taking any part in expending or in approving the payment of any money of the Commonwealth in pursuance of, or incidental to, or because of the purported adoption of, the new c. 118A, with the same exceptions as above set forth in connection with the writ to be issued in the first case.

So ordered.

F. W. Grinnell, & S. P. Sears, for the petitioners Sears and others.

F. B. Wallis, (*R. E. Goodwin, L. Wheeler, Jr., & A. C. Conley* with him,) for the petitioners Ellison and others.

L. E. Ryan, Assistant Attorney General, (*D. H. Stuart,* Assistant Attorney General, with him,) for the respondents.

(Continued from p. 37)

In Carnasion et al v. Paul et al, before the Florida Supreme Court in June 1951, a landowner was taxed by the County on a steel pier. He claimed that the California case gave the United States "exclusive and despotic dominion" so that the pier location was beyond state taxing power. On June 21 the Court held that the County could tax. The United States was not a party. See Commerce Clearing House State Tax Review of July 5.

1950 SUPPLEMENT TO CROCKER'S NOTES

(Second Series)

MASSACHUSETTS CONVEYANCERS' ASSOCIATION

THE SAMUEL T. HARRIS MEMORIAL FUND

Twelve supplements to the Sixth Edition of Crocker's Notes, prepared by the editor, Roger D. Swaim, for the Massachusetts Conveyancers' Association were reprinted, by permission, in the "Quarterly" from 1939 to 1946. (See 31 M.L.Q. Dec. 1946, 42.)

In 1949 these notes, rearranged, enlarged and added to include cases through 321 Mass. and 1948 statutes were published by Little, Brown & Co. in a bound "Supplement" with an article on "The Mechanics of Title Examination", by Richard B. Johnson, and a list of wills construed by the Supreme Judicial Court from 166 to 321 Mass. (continuing the earlier list prepared by Prescott Hall in 1896).

The following additional supplement is the second since that volume. Ed.

SUPPLEMENTARY NOTES TO CROCKER'S NOTES ON COMMON FORMS COVERING THE YEAR 1950.

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Roger D. Swaim.

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